Supreme Court, U.S.
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No. ——— OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

STEVEN D. SITKOFF and BERNICE E. SITKOFF, Individually and as Parents and Natural Guardians of Jessica Sitkoff, a Minor, and as Administrators of the Estate of Gwyn Allison Sitkoff, Deceased,

Petitioners,

v.

BMW OF NORTH AMERICA, INC. and BAVARIAN MOTOR WORKS, A.G.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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104 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the nonmoving party, on a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, meets its burden of production under *Celotex Corp. v. Catrett*, 477 U.S. 242 (1986), by pointing to interrogatory answers outlining their experts' theory of the case and identifying the experts who will provide testimony supporting that theory.

2. Whether strict compliance with Federal Rule of Civil Procedure 56(f), in the technical form of an affidavit, is required to invoke the protections of the Rule, where a court has notice that essential discovery is still outstanding.

3. Whether dismissal as a discovery sanction under Federal Rule of Civil Procedure 37(b) may be imposed by a district court without giving prior warning and explanation on the record of reasons for the sanction so as to allow meaningful review for abuse of discretion by courts of appeals.

PARTIES TO THE PROCEEDING BELOW

The following persons and entities were parties before the United States Court of Appeals for the Third Circuit: Steven D. Sitkoff and Bernice E. Sitkoff, Individually and as Parents and Natural Guardians of Minor Jessica Sitkoff, and as Administrators of the Estate of Gwyn Allison Sitkoff, Deceased (Appellants); BMW of North America, Inc., and Bayerische Motoren Werke Aktiengesellschaft, named in the complaint as Bavarian Motor Works, A.G. (Appellees).

The Estate of Roslyn Schreiber, the Estate of Myron Schreiber, the Commonwealth of Pennsylvania, Department of Transportation, John Doe, No. 1, John Doe, No. 2, John Doe, No. 3 were third-party defendants who have been dismissed and have no interest in the outcome of the petition.

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PETITION FOR WRIT OF CERTIORARI

Steven D. Sitkoff and Bernice E. Sitkoff respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The final order of the Court of Appeals on petition for rehearing (App. 1a-2a) is unreported. The judgment of the Court of Appeals (App. 3a-4a) is reported at 92 F.3d 1172 (3d Cir. 1996). The opinion of the District Court granting summary judgment for respondents (App. 13a-35a) is unreported but cited at 1995 WL 420033 (E.D. Pa. 1995), and the opinion denying petitioners' motion for reconsideration (App. 5a-12a) is unreported but cited at 1995 WL 696894 (E.D. Pa. 1995). An unrelated opinion by the District Court is reported at 846 F. Supp. 380 (E.D. Pa. 1994).

JURISDICTION

On August 22, 1996, the Court of Appeals denied a petition for rehearing and suggestion for rehearing *en banc* of its July 25, 1996 judgment. (App. 1a-2a). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

The rules involved in the case, Rules 56(c), (e), and (f) and Rule 37(b) of the Federal Rules of Civil Procedure, appear in the appendix to this petition. (App. 75a-77a).

STATEMENT OF THE CASE

This diversity action pursuant to 28 U.S.C. § 1332 arises from the tragic crash of a 1988 BMW 325i convertible on July 18, 1991, when the car flipped over, killing eleven-year-old Gwyn Sitkoff and permanently injuring her eight-year-old sister, Jessica Sitkoff. Petitioners, the parents of the Sitkoff children, filed this products liability suit against the manufacturer of the convertible ("BMW AG"), and its wholly-owned American subsidiary ("BMW NA"), alleging that the defective design of the convertible, including the failure to incorporate a roll bar or other rollover protection device, caused or enhanced the injuries to their daughters. The defendants (collectively referred to as "BMW") denied those allegations, and filed a third-party complaint joining the owner and the driver of the BMW convertible, as well as the Pennsylvania Department of Transportation and three John Doe defendants.

The Sitkoffs served two sets of interrogatories and requests for production on both of the BMW defendants, seeking engineering data, test results, and other information necessary to establish plaintiffs' crashworthiness claims. BMW NA objected to most of the discovery requests or served evasive responses, stating for example that it did not know what the term "roll bar" meant, even

though subsequent 300 series convertibles have roll bars incorporated into their design. BMW AG failed to respond to either set of discovery requests, taking the position as to the first set of discovery that, because that discovery was forwarded to its wholly-owned American subsidiary, it was never served with the discovery at all.

The Sitkoffs filed a Rule 37(d) motion to compel responses against BMW AG and a Rule 37(a) motion to compel discovery against BMW NA. BMW AG then offered to make certain photographs and test results available for inspection, but the information furnished was for a BMW coupe, not a convertible, and thus was irrelevant. BMW AG also served written responses which mirrored those of BMW NA, incorporating the same objections and evasive responses.

The District Court never ruled on either motion. Three and one-half months after the motions to compel were filed, the District Court imposed a "meet and confer" requirement, obligating the parties to go over each and every discovery response. BMW agreed to withdraw or reconsider a number of objections and responses, but did not provide supplemental discovery responses. The Sitkoffs then filed a motion to extend the time for serving expert reports by virtue of the promised, but not yet received, supplemental discovery responses.

BMW opposed the motion for extension. BMW did not dispute that it had failed to provide supplemental discovery responses. Rather, BMW contended that the Sitkoffs had failed to file the motion for extension before the deadline had passed, as required by the trial judge's form scheduling order. BMW simultaneously filed a

motion for summary judgment on the ground that the Sitkoffs had not served expert reports in accordance with the deadline in the scheduling order and that, absent expert reports, the Sitkoffs could not make out a prima facie crashworthiness case under Pennsylvania law.

BMW neglected to tell the court that, one year previously, the Sitkoffs had served interrogatory answers in which they laid out their theory of the case, detailed the existence of an alternate feasible design which would have reduced or eliminated the injuries to the children, identified experts who would provide such testimony, and furnished curriculum vitae for the experts. (App. 36a-74a). These interrogatory answers, which were on file with the court, stated that it was feasible for BMW "to have installed either a fixed or pop-up roll bar in the vehicle", that BMW "also should have strengthened A-pillar and seat belt pretensioners in the vehicle", and that "the installation of such devices and others would have prevented or at least lessened the injuries sustained". (App. 50a-51a). In response to an interrogatory asking the plaintiffs to identify their testifying experts, the Sitkoffs listed experts who would "testify on the subjects of occupant protection, crashworthiness, roll bar design, and suitability and practicality of including a roll bar in the vehicle". (App. 53a).

In opposing the summary judgment motion, the Sitkoffs submitted a copy of these interrogatory answers. The Sitkoffs asserted that decision on the summary judgment motion was inappropriate in view of pending discovery motions that were necessary for properly detailed expert reports.

Without holding oral argument, the District Court denied the motion for extension as a sanction for non-compliance with the deadline. (App. 26a). In so ruling, the District Court did not engage in the analysis required by the Third Circuit in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984).

Having thus precluded plaintiffs from offering expert reports, the District Court granted the motion for summary judgment because the Sitkoffs had not produced expert reports. The District Court held that "[w]ithout expert testimony, and indeed, without any affidavits or *other evidence offered in opposition* to defendants' motion for summary judgment, there is no evidence of record to support plaintiffs' crashworthiness claim." (App. 31a) (emphasis supplied). The District Court faulted the Sitkoffs for not filing a Rule 56(f) affidavit stating they needed additional discovery to oppose the summary judgment motion, finding the cross-motion to compel decision on their discovery motions to be "wholly inadequate". (App. 28a). The District Court then denied the outstanding discovery motions against BMW as "moot." (App. 32a).

The Sitkoffs moved for relief from the judgment, asserting that their cross-motion to compel discovery was the functional equivalent of a Rule 56(f) affidavit, and tendering formal Rule 56(f) affidavits from three of their experts that confirmed what the District Court had been told before: The test data, engineering documents, and other disputed discovery were necessary to formulate complete opinions in Rule 26(b)(4) expert reports. The Sitkoffs alerted the District Court that it erred in finding plaintiffs had presented "no evidence" in support of their

crashworthiness claims by pointing to the extensive interrogatory answers they had attached to the motion for summary judgment, in which they identified experts and outlined their theories.

The motion for reconsideration was denied three months later. The District Court again ignored the interrogatory answers and stated that the Sitkoffs had offered no justification for their failure to provide "any evidence", and made a credibility determination that "[a]lthough all of the expert affidavits express the need for certain information from BMW before completing their reports, none expresses an opinion concerning any connection between the design of the vehicle and the injuries sustained. . . . " (App. 9a).

The Sitkoffs filed a timely notice of appeal. The Third Circuit heard oral argument and affirmed "after re-examining the record," despite "the forceful arguments" of counsel. (App. 3a). The petition for rehearing and suggestion for rehearing *en banc* were denied on August 22, 1996. (App. 1a).

REASONS FOR GRANTING THE WRIT

This case presents an important question in the administration of summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure. Under the Federal Rules of Civil Procedure, a motion for summary judgment streamlines the litigation process. However, the grant of a summary judgment motion forever denies a litigant a day in court before a jury. Rule 56 should thus be "invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them." *Associated Press v. United States*, 326 U.S. 1, 6 (1945).

The decision by the United States Court of Appeals for the Third Circuit below conflicts with established case law of this Court relating to the nonmoving party's burden of production in opposition to a motion for summary judgment. The decision also conflicts with case law in the Third Circuit and in the First, Fifth, Sixth, and Eleventh Circuits concerning the appropriate procedure for alerting a district court that additional discovery is needed prior to resolution of a motion for summary judgment.

The decision also runs counter to the Court's prior decisions relating to dispositive discovery sanctions, and particularly a mandatory six part test imposed by the Third Circuit, which the District Court did not apply in this case – a noncompliance that was indulged by the Third Circuit.

ARGUMENT

I.

THE THIRD CIRCUIT HAS APPLIED THE SUMMARY JUDGMENT STANDARD IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE COURT.

The decision here conflicts with the Court's decision in *Celotex v. Catrett*, 477 U.S. 317 (1986). The precise issue in *Celotex* was the burden of production on the moving party (here BMW) in a summary judgment motion asserting that the plaintiff lacks evidence to establish an essential element of the case at trial. This case presents the obverse of that issue: The nonmoving party's burden of production to show that there is evidence probative of an essential element of the case. According to *Celotex*, the Sitkoffs met this burden.

The plurality opinion in *Celotex* reaffirmed the obligation of the nonmoving party (here the Sitkoffs) where the nonmoving party bears the burden of persuasion at trial, to "go beyond the pleadings" to show a genuine issue for trial. Chief Justice Rehnquist's opinion instructed that a nonmoving party is not required to:

> produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by *any of the kinds* of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally

> expect the nonmoving party to make the showing to which we have referred.

Id. at 324 (emphasis supplied).

Justice White, in his concurring opinion, said that it is sufficient to *identify* the witness(es) who will offer the testimony needed to defeat the motion. *Id.* at 328 (White, J., concurring).

Justice Brennan said that "the nonmoving party may defeat a motion for summary judgment . . . by *calling the Court's attention* to supporting evidence already in the record that was overlooked or ignored by the moving party." *Id.* at 332 (emphasis supplied).

Interrogatory answers are "the kinds of evidentiary materials listed in Rule 56(c)" and are sufficient to defeat summary judgment. *Id.* at 324. *See also* Fed. R. Civ. P. 56(c) (identifying the relevant evidentiary materials as "depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any"). The interrogatory answers identifying the Sitkoffs' experts satisfied their evidentiary burden of production under all three of the foregoing formulations.

In short, the courts below awarded summary judgment in the face of factual evidence tending to establish the BMW convertible was not crashworthy, in the form of identified experts who would so testify. This disposition flies in the face of over sixty years of summary judgment jurisprudence and is contrary to the Court's teachings in *Celotex*.

II.

THE THIRD CIRCUIT HAS APPLIED RULE 56(f) IN A MANNER THAT CONFLICTS WITH ITS OWN DECISIONS AND WITH DECISIONS OF OTHER CIRCUITS.

A second procedural issue presented in this case is the application of the protections of Rule 56(f) of the Federal Rules of Civil Procedure. That rule allows the district court, in the context of a summary judgment motion, to "refuse the application for judgment or . . . order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Fed. R. Civ. P. 56(f). "The purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary judgment and the rule generally has been applied to achieve that objective." 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2740, at 532 (2d ed. 1983). The grant of summary judgment is erroneous under Rule 56(f) if there are outstanding motions to compel discovery that could yield the necessary evidence. WRIGHT, MILLER & KANE, *supra*, § 2741 at 541, 543-44.

Thus: *Resolution Trust Corp. v. North Bridge Associates, Inc.*, 22 F.3d 1198, 1208 (1st Cir. 1994) (district courts should construe motions invoking Rule 56(f) generously, holding parties to the rule's spirit rather than its letter; "[w]hen Rule 56(f) functions properly, it ensures that, in the mine-run of cases, a litigant who fails to answer potentially relevant discovery requests on schedule will be unable to demand summary judgment until after he remedies his failure"); *Wichita Falls Office Assoc. v. Banc*

One Corp., 978 F.2d 915, 919 (5th Cir.) (continuance of motion for summary judgment for purposes of discovery should be granted almost as a matter of course), *cert. denied*, 508 U.S. 910 (1992); *Dean v. Barber*, 951 F.2d 1210, 1213, 1214 n.3 (11th Cir. 1992) (district court erred by granting summary judgment without ruling on outstanding motion to compel discovery); *Snook v. Trust Co. of Georgia Bank of Savanah, N.A.*, 859 F.2d 865, 871 (11th Cir. 1988) (party opposing motion for summary judgment need not file affidavit pursuant to Rule 56(f)); *Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984) (summary judgment inappropriate where discovery requests were outstanding even where nonmovant failed to request a continuance or by identifying outstanding discovery required to oppose summary judgment); *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir.) ("[o]ut of an abundance of caution and to prevent a possible injustice" affidavit was not required to invoke the protection of Rule 56(f)), *cert. denied*, 414 U.S. 1116 (1973).

The Fourth, Eighth, Ninth, and Tenth Circuits, on the other hand, require rigid compliance with Rule 56(f). *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995) (district court did not abuse its discretion in denying motion for continuance when plaintiff failed to file affidavit specifying which aspects of discovery required more time to complete); *Humphreys v. Roche Biomedical Laboratories, Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993) (Rule 56 does not require trial courts to allow parties to conduct discovery before entering summary judgment) (citing *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986)); *Guthrie v. Sawyer*, 970 F.2d 733, 738 (10th Cir. 1992) (filing of affidavit

required to invoke protection of Rule 56(f)); *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1376 (10th Cir. 1988) (Rule 56(f) protection arises *only if* the nonmoving party files an affidavit, even where party clearly apprises court of need for discovery in some other manner).

Legal commentators favor the liberal interpretation of Rule 56(f):

> Courts that allow some deviation from the strict letter of rule 56(f) have the stronger argument. The intent of the drafters to infuse the Federal Rules with a spirit of procedural liberality is evident throughout the rules themselves as well as the advisory committee's notes. . . . To grant summary judgment where discovery seems likely to create a genuine issue for trial, simply because a party failed to file the proper affidavit, runs counter to the general spirit of the rules.

Lapham, *Summary Judgment Before the Completion of Discovery: A Proposed Revision of Federal Rule of Civil Procedure 56(f)*, 24 MICH. J.L. REF. 253, 269 (1990). The Federal Rules of Civil Procedure intended to "express a preference for dispositions of cases on the merits, after full disclosure for discovery, over dispositions based on technical pleading failures". *Id.* at 256.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Court noted that the provision in Rule 56(e) that an opposing party must set forth specific facts showing there is a genuine issue for trial "is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had an opportunity to discover

information that is essential to his opposition". *Id.* at 250 n.5. The Court has not had occasion to explore the parameters of Rule 56(f) protection, however.

This case affords an opportunity for the Court to state clearly that summary judgment is inappropriate where essential discovery remains outstanding, to clarify Rule 56(f) procedures, and to give guidance to the lower courts as to when and how to administer Rule 56(f) protection.

III.

THE THIRD CIRCUIT HAS LEGITIMATED DISMISSAL AS A DISCOVERY SANCTION, IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, AS WELL AS THIRD CIRCUIT PRECEDENT.

The Court has undertaken to construe discovery sanctions under Rule 37 on only three occasions since the adoption of the Federal Rules of Civil Procedure in 1938. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea,* 456 U.S. 694 (1983); *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639 (1976); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197 (1958). The Court has sustained dismissal sanctions only on the basis of repeated disregard of discovery orders where the district court offered warnings before dismissing the complaint. *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. at 642 (record outlined dilatory discovery practices including interrogatories remaining unanswered for seventeen months, repeated extensions, several admonitions by the court, grossly inadequate responses); *Insurance*

Corp. of Ireland, 456 U.S. at 707 (district court provided detailed explanation and gave ample warning). This Court's decisions thus require specific district court admonition before the imposition of discovery sanctions that effectively deny a litigant his day in court.

The Third Circuit, implementing this requirement, had heretofore required application of a six factor test before upholding dismissal as an appropriate sanction. *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984) (district court must consider (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) history of dilatoriness; (4) whether the conduct was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails the analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense). In the Tenth Circuit, the criteria for a district court to consider prior to imposing dismissal as a sanction are: "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; . . . (3) the culpability of the litigant; . . . (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for non-compliance; . . . and (5) the efficacy of lesser sanctions". *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992). The First Circuit, in determining what sanction if any is appropriate in such a situation, has held that a district court should consider (1) the willfulness or bad faith of the non-complying party; (2) the prejudice to the opposing party resulting from the violation; (3) whether the procedural history indicates protracted inaction or deliberate delay, and (4) the disregard of earlier

warnings of the consequences of misconduct. *Velazquez-Rivera v. Sea-Land Service, Inc.*, 920 F.2d 1072, 1076-78 (1st Cir. 1990). *See also* WRIGHT, MILLER & KANE, *supra*, § 2284 at 625-27 & n.39.

However, not every circuit requires analysis on the record. Review at the appellate level has been inconsistent at best. *See Scarborough v. Eubanks*, 747 F.2d 871, 875 (3d Cir. 1984) (Third Circuit precedent requires on-the-record review of test); *Porter v. Martinez*, 941 F.2d 732, 733 (9th Cir. 1991) (district court required to explain determination). *But see Ehrenhaus v. Reynolds*, 965 F.2d at 921 (district court should, not must, consider factors). Not all circuits agree on whether lesser sanctions must, or should, be considered.[1]

This case presents the Court with another opportunity to address discovery sanctions that have peremptory effect, in particular, a district judge's duty to warn a litigant of an impending sanction of dismissal or default judgment, to consider lesser sanctions, and to put its analysis on the record. Appellate courts should have a

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[1] Recommending consideration of lesser sanctions: *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 75 (7th Cir. 1992); *Meade v. Grubbs*, 841 F.2d 1512, 1520 (10th Cir. 1988); *Batson v. Neal Spelce Association, Inc.*, 765 F.2d 511, 516 (5th Cir. 1985); *Jones v. Louisiana State Bar Association*, 602 F.2d 94, 97 (5th Cir. 1979). Requiring considerations of lesser sanctions: *Avionic Co. v. General Dynamics Corp.*, 957 F.2d 555, 558 (8th Cir. 1992); *Schilling v. Walworth County Park & Planning Commission*, 805 F.2d 272, 275 (7th Cir. 1986); *Shea v. Donohoe Construction Co.*, 795 F.2d 1071, 1075 (D.C. Cir. 1986). No consideration of lesser sanctions: *Halas v. Consumer Services, Inc.*, 16 F.3d 161, 165 (7th Cir. 1994); *Morgan v. Massachusetts General Hospital*, 901 F.2d 186, 195 (1st Cir. 1990).

complete record to review on appeal. Otherwise, litigants can be deprived of a day in court without opportunity for meaningful review.

"[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause". *Societe Internationale v. Rogers*, 357 U.S. at 209 (considering the appropriateness of dismissal as a Rule 37 discovery sanction). *See also Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (the opportunity for a hearing must be granted in a "meaningful manner" as appropriate to the nature of the case). Here, the Third Circuit established a procedural test "appropriate" for determining the applicability of dismissal sanctions, but has refused to follow that test.

Selective abandonment of clearly established holdings and legal tests without an articulated explanation undermines the value of precedent and weakens the integrity of the entire judicial system. "The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits". *Degen v. United States*, 116 S. Ct. 1777, 1783 (1996).

CONCLUSION

For the reasons set forth above, petitioners urge that this petition for writ of certiorari be granted.

Respectfully submitted,

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**Counsel of Record*

Dated: November 20, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-2095

STEVEN D. SITKOFF; BERNICE E. SITKOFF, Individually and as Parents and Natural Guardians of Minor, Jessica Sitkoff, and as Administrators of the Estate of Gwyn Allison Sitkoff, deceased

v.

BMW OF NORTH AMERICA, INC.; BAVARIAN MOTOR WORKS, A.G.

v.

THE ESTATE OF ROSLYN SCHREIBER; THE ESTATE OF MYRON SCHREIBER; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION; JOHN DOE, No. 1; JOHN DOE, No. 2; JOHN DOE, No. 3

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and McKEE, *Circuit Judges*

The petition for rehearing filed by Appellants Steven D. Sitkoff and Bernice E. Sitkoff in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and

no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ D K Sloviter
Chief Judge

Dated: AUG 22 1996

bj/cc: BWK, ODA, WFK

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 95-2095

STEVEN D. SITKOFF; BERNICE E. SITKOFF, Individually and as Parents and Natural Guardians of a Minor, Jessica Sitkoff, and as Administrators of the Estate of Gwyn Allison Sitkoff, deceased,

Appellants

v.

BMW OF NORTH AMERICA, INC.; BAVARIAN MOTOR WORKS, A.G.

Third-Party Plaintiffs

v.

THE ESTATE OF ROSLYN SCHREIBER; THE ESTATE OF MYRON SCHREIBER; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION; JOHN DOE, No. 1; JOHN DOE, No. 2; JOHN DOE, No. 3,

Third-Party Defendants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 93-cv-03804)
District Judge: Hon. E. Mac Troutman

Argued July 18, 1995

Before: SLOVITER, *Chief Judge*
COWEN and ROTH, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, and after reexamining the record following the forceful arguments presented by the plaintiffs' appellate counsel, both in the briefs and the oral presentation, and independently reaching the conclusion that under the precedent of this court the district court neither erred as a matter of law nor abused its discretion in making its ruling precluding expert evidence in light of the failure of plaintiffs' trial counsel to respond sufficiently, adequately or timely to the pretrial requirements imposed by the trial court and the Federal Rules of Civil Procedure, it is therefore

ADJUDGED and ORDERED that the summary judgment order entered by the district court July 14, 1995 and the order denying the motion for reconsideration entered November 22, 1995 be and are hereby affirmed. Costs taxed against appellants.

By the Court,

/s/ D K Sloviter
Chief Judge

Attest:

/s/ Bradford Baldus
Chief Deputy Clerk

Dated: JUL 25 1996

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

STEVEN D. SITKOFF, and BERNICE E. SITKOFF, Individually and as Parents and Natural Guardians of a Minor, Jessica Sitkoff, and as Administrators of the Estate of Gwyn Allison Sitkoff, Deceased Plaintiffs vs. BMW OF NORTH AMERICA, INC., and BAVARIAN MOTOR WORKS, A.G, Defendants/Third Party Plaintiffs vs. THE ESTATE OF ROSLYN SCHREIBER, THE ESTATE OF MYRON SCHREIBER, and THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Third Party Defendants	CIVIL ACTION NO. 93-3804

TROUTMAN, S.J.

MEMORANDUM

(Filed Nov. 22, 1995)

On July 14, 1995, this Court granted defendants' motion for summary judgment and entered judgment in favor of the defendants based upon plaintiffs' failure to

properly and appropriately respond to defendants' motion for summary judgment. Specifically, we concluded that plaintiff had failed to produce any evidence of how the injuries suffered by Jessica Sitkoff and Gwyn Sitkoff, who was fatally injured, were caused by the allegedly defective design of the BMW 325i convertible in which they were passengers at the time of the accident, and how such injuries would have been prevented or mitigated by a different design. Moreover, although plaintiffs contended that they were unable to produce expert reports because of the defendants' failure and refusal to respond to discovery requests, plaintiffs did not respond to defendants' motion for summary judgment by a cross-motion pursuant to Fed. R. Civ. P. 56(f) and did not produce the affidavits therein required. Finally, for the second time, and with no explanation, plaintiffs had permitted the expert discovery deadline to expire without a prior motion for extension thereof.

Plaintiffs' pending motion for reconsideration attempts to supplement the original record with respect to one of these issues, their failure to submit affidavits in accordance with Rule 56(f). Submission of such affidavits at this juncture, however, is far too little, comes far too late and does not show good cause or provide a reasonable explanation for plaintiffs' failure to timely submit such affidavits in response to defendants' motion for summary judgment in the first instance.

In addition, with respect to the discovery issues, plaintiffs' only attempted explanation of their failure to comply with the scheduling orders in this matter is the plaintive and subjective outcry that defendants' discovery abuses in this matter exceeded theirs. Presumably,

plaintiffs contend, therefore, that they are entitled to have their inadequate response to defendants' motion for summary judgment excused.

As a substitute for the lack of any substantive and legally cognizable reason to disturb the Court's decision in this matter, plaintiffs' motion for reconsideration is replete with baseless accusations that the Court is biased in favor of the defendants and against the plaintiffs. Plaintiffs are apparently attempting to unnerve the Court and thereby procure a reversal of the summary judgment decision based upon coercion rather than legal merit.[1]

It appears that plaintiffs lack a clear understanding of their burden in litigation, particularly when pursuing a products liability crashworthiness claim. Plaintiffs' insistence that the Court has placed a greater burden on them with respect to discovery seems to arise from their unwillingness to accept the burden placed upon them by Fed. R. Civ. P. 56(c), *i.e.*, the necessity of demonstrating that they can produce sufficient evidence to support every essential element of their claim when challenged to do so by a motion for summary judgment. Underlying

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[1] It appears to the Court that plaintiffs have attempted to prevail by means of a variation of the old adage: "If the facts are against you, argue the law; if the law is against you, argue the facts; if both the facts and the law are against you, throw yourself on the mercy of the Court." In this instance, however, finding both the facts and the law against them, plaintiffs have transmuted the final admonition into an attack upon the Court.

Thus, plaintiffs apparently feel that they can persuade the Court that the facts and the law are not against them by throwing accusations *at* the Court! Such a strategy is dubious at best, childish at worst, and, in this case, wholly ineffective.

plaintiffs' recitation of their perception of the discovery process in this case is the implicit assumption that their mere accusation that defendants have failed to cooperate in discovery should relieve plaintiffs of the obligation to respond appropriately to defendants' motion for summary judgment. Defendants' purported lack of cooperation, however, is relevant only to the extent that plaintiffs were thereby prevented from meeting their burden of proof.

Notably absent from plaintiffs' argument on the motion for reconsideration and from all of the belated affidavits submitted in support thereof is any suggestion that plaintiffs have the information that the Court initially considered essential to defeat summary judgment, *i.e.*, evidence that the specific injuries sustained by Gwyn or Jessica Sitkoff as a result of the accident were caused by the lack of some type of passenger protection device in the accident vehicle. Nowhere in the expert affidavits, which were produced within ten days of the entry of judgment but not within the thirty days allotted for a response to the motion for summary judgment, is there any suggestion that plaintiffs' experts reviewed medical records relating to the injuries as well as inspected the accident vehicle in preparation for producing an expert report. (*See*, Plaintiffs' Motion For Reconsideration of Order entered July 14, 1995, (Doc. #64), Exh. A, B, C). Indeed, only one of the experts makes any reference to the injuries sustained by Gwyn Sitkoff, only, and without describing such injuries. (*Id.*, Exh. A). A different expert refers to a review of autopsy reports, (*Id.*, Exh. B), but does not indicate whether one such report was of Gwyn Sitkoff or that such report supports an opinion that the

vehicle was defective and that such defect caused enhanced injuries to Gwyn or Jessica Sitkoff. Although all of the expert affidavits express the need for certain information from BMW before completing their reports, none expresses an opinion concerning any connection between the design of the vehicle and the injuries sustained or indicates how information sought from the defendants relates to causation and why the absence of such information renders it impossible to express an opinion thereon.

Most interestingly, a comparison of the affidavit of one of plaintiffs' newly identified experts, Dr. Bertelson, with plaintiffs' answers to interrogatories reveals a significant difference in the description of the positions of Gwyn and Jessica Sitkoff in the vehicle at the time of the accident. Dr. Bertelson notes that both of the girls were in the rear of the vehicle, (*See*, Exh. C), while in answer to the interrogatory asking plaintiffs to "State in detail the facts as to how you contend the occurrence took place", plaintiffs report that Jessica Sitkoff was seated in the right front seat and her sister, the decedent, was seated in the right rear seat. (*See*, Exh. D). Although it is impossible to determine whether such a discrepancy in the basic facts of the accident which must be taken into account in an expert opinion is significant in this instance, that very uncertainty highlights the lack of substance in the plaintiffs' expert affidavits.

As noted in our previous opinion, information concerning the injuries and how the accident occurred are entirely within the control of plaintiffs, yet do not seem to have been provided to plaintiffs' expert witnesses. It is difficult to understand why an engineering expert who expects to render an opinion in a crashworthiness case

finds it essential to have data from the defendants to support his expert opinions but does not consider medical reports or a clear understanding of the passengers' position in the vehicle important to his opinion.

In summary, no amount of hysterical finger-pointing or invective against the Court can disguise or remedy plaintiffs' lapses which led to the entry of summary judgment: (1) twice permitting the expert discovery deadline to pass without previously notifying the Court of the need for an extension of time; (2) failing to notify the Court that there was a continuing discovery dispute between the parties after they were directed to resolve the issues raised by plaintiffs' motion to compel discovery; (3) failing to appropriately respond to the defendants' motion for summary judgment with, at least, a properly supported Rule 56(f) motion; (4) failing to demonstrate by means of at least preliminary expert reports or affidavits that the alleged defects in the accident vehicle caused or enhanced the injuries suffered by Gwyn and Jessica Sitkoff in the accident. Even the belated submission of affidavits which purport to support a Rule 56(f) motion fail to address the last, and most important, issue. Consequently, there is no basis for reconsidering this Court's decision to grant defendants' motion for summary judgment. Plaintiff's motion, therefore, will be denied.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

STEVEN D. SITKOFF, and BERNICE E. SITKOFF, Individually and as Parents and Natural Guardians of a Minor, Jessica Sitkoff, and as Administrators of the Estate of Gwyn Allison Sitkoff, Deceased Plaintiffs vs. BMW OF NORTH AMERICA, INC., and BAVARIAN MOTOR WORKS, A.G, Defendants/Third Party Plaintiffs vs. THE ESTATE OF ROSLYN SCHREIBER, THE ESTATE OF MYRON SCHREIBER, and THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Third Party Defendants	CIVIL ACTION NO. 93-3804

TROUTMAN, S.J.

ORDER

AND NOW, this 20th day of November, 1995, upon consideration of Plaintiffs' Motion For Reconsideration of Order entered July 14, 1995, (Doc. #64), and defendants'

response thereto, **IT IS HEREBY ORDERED** that the motion is **DENIED.**

/s/ E. Mac Troutman
S.J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

STEVEN D. SITKOFF, and BERNICE E. SITKOFF, Individually and as Parents and Natural Guardians of a Minor, Jessica Sitkoff, and as Administrators of the Estate of Gwyn Allison Sitkoff, Deceased Plaintiffs vs. BMW OF NORTH AMERICA, INC., and BAVARIAN MOTOR WORKS, A.G, Defendants/Third Party Plaintiffs vs. THE ESTATE OF ROSLYN SCHREIBER, THE ESTATE OF MYRON SCHREIBER, and THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Third Party Defendants	CIVIL ACTION NO. 93-3804

TROUTMAN, S.J.

MEMORANDUM

(Filed Jul. 14, 1995)

The above-captioned action arises from a tragic, fatal accident which occurred on Interstate 78 in Berks County,

Pennsylvania, on July 18, 1991. Jessica and Gwyn Sitkoff, daughters of plaintiffs Steven and Bernice Sitkoff, were passengers in a BMW 325i convertible owned and driven by their grandparents, Roslyn and Myron Schreiber. Along a construction site where the road conditions were poor, the left wheels of the car allegedly entered a depressed area causing the driver, Roslyn Schreiber, to lose control of the auto. The car allegedly struck a guard-rail, struck a tree, rolled over and rolled down an embankment. Roslyn and Myron Schreiber and Gwyn Sitkoff were killed; Jessica Sitkoff allegedly suffered severe injuries.

The gravamen of plaintiffs' complaint is that the injuries suffered by Jessica and Gwyn Sitkoff would not have occurred or would have been less serious but for the failure of defendants to equip the BMW convertible with a roll bar, stronger "A" frames or similarly effective passenger protection devices. Thus, this is a "crashworthiness" case, in that plaintiffs allege that a design defect in the vehicle caused enhanced injuries in the accident but do not allege that any defect in the vehicle caused the driver to lose control or caused the vehicle to leave the road.

The Court has jurisdiction pursuant to 28 U.S.C.A. §1332 (West 1995) (diversity jurisdiction). To the extent state law applies, the Court concludes that the law of Pennsylvania is controlling as many of the material

events occurred within the Commonwealth and Pennsylvania has the most significant interest in the outcome of the matter.[1]

A number of motions are pending before the Court, including: plaintiffs' Motion For Enlargement Of Time In Which to Serve Expert Reports; defendants' motions for Summary Judgment and for Sanctions, based upon plaintiffs' failure to produce expert testimony; plaintiffs' Cross-Motion For Ruling On Outstanding Discovery Motions, which likewise serves as their response to defendants' motion for summary judgment.

For the reasons which follow, the plaintiffs' motions will be denied, the defendants' motions will be granted, all third party claims, crossclaims, and counterclaims will be dismissed, and judgment will be entered in favor of defendants and against plaintiffs.

I. PROCEDURAL HISTORY and PENDING MOTIONS

Although this action was filed in July, 1993, an unusually large number of motions to join/dismiss third-party defendants, amend third party complaints and stipulations to extend time for responses thereto kept the pleadings open well into 1995. As a result, the Court's usual procedures of convening an early scheduling/settlement conference and/or of quickly setting a discovery schedule were impeded.

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[1] The parties have not addressed which state's law is controlling in this diversity action, but they have argued, and cited to, the law of Pennsylvania.

By mid-1994, however, the primary parties, at least, had begun to conduct discovery and to experience problems in that process. Consequently, plaintiffs filed motions to compel discovery against both defendants on July 1, 1994. Briefing on those motions continued until mid-August. Thereupon, the Court scheduled a conference for October, 1994.

At that conference, we informed counsel of our usual procedure of requiring face to face meetings between counsel in an effort to resolve discovery disputes prior to filing a motion to compel discovery, and directed the parties to apply that procedure to plaintiffs' pending motions.

We likewise entered a scheduling order which set a discovery deadline of April 14, 1995, with production of plaintiffs' expert reports by January 13, 1995. The October, 1994, scheduling order also explicitly (1) required face to face meetings between counsel to try to resolve discovery disputes and reach agreement on requests for alterations of the schedule; (2) provided that good cause must be shown for extensions of the schedule and (3) provided that requests for such extensions, if contested, must be made by motion served at least ten days prior to expiration of the period sought to be extended.

Nevertheless, on January 13, 1995, the day plaintiffs were to produce expert reports, they moved for an extension of time to do so, citing defendants' failure to produce certain requested discovery despite the apparent agreement among counsel to resolve some of the outstanding discovery disputes which had been reached at a

face to face meeting subsequent to the October, 1994, conference with the Court.

Because defendants did not oppose plaintiffs' untimely motion for enlargement of time, the motion was granted on February 24, 1995, and a new scheduling order was entered. Said order granted plaintiffs the additional sixty days they requested for production of expert reports, concomitantly adjusted all other significant dates for completing discovery, and reiterated the requirements for face to face meetings to resolve discovery disputes, for demonstrating good cause for extensions of time, and for ten days' prior notice of requests for extensions of the time limits set forth in the schedule.

On May 1, however, with no prior notice to defendants, without the required certification that counsel met and were unable to agree upon the requested extension of time, and without explanation or excuse for their failure to obey the Court's order for the second time, plaintiffs again moved to extend the time to produce an expert report on the very day the scheduling order required them to produce such a report. Moreover, the motion itself is virtually identical to the prior motion for extension of time, except that the dates have been changed and plaintiffs now contend that, in addition to defendants' alleged failure to produce all of their own documents requested by the plaintiffs and their failure to sufficiently answer plaintiffs' interrogatories, defendants have noticed and canceled the depositions of the plaintiffs, of Jessica Sitkoff and of Ron Dellavechia, the funeral director who prepared Gwyn Sitkof[f]'s body for burial. Plaintiffs argue that the discovery sought from defendants is intended to form the basis of the opinions of plaintiffs'

expert(s) and is necessary for production of expert report(s). Plaintiffs further argue that the evidence to be adduced at the enumerated depositions is critical to proof of plaintiffs' crashworthiness claims with respect to both liability and damages.

This time, defendants opposed plaintiffs' motion for extension of time and moved for sanctions, contending that, because plaintiffs have violated the scheduling order in several respects for the second time, and because plaintiffs have failed to show good cause for their requested extension of time, plaintiffs should be precluded from introducing expert testimony at trial. With respect to plaintiffs' lack of good cause for a further extension of time to produce expert reports, defendants note that: (1) plaintiffs have failed to specifically identify the discovery needed from defendants in order for plaintiffs to procure expert opinion(s); (2) plaintiffs have failed to inspect documents and films which defendants made available to them after their face to face meetings to resolve discovery disputes; (3) plaintiffs have failed to revise, pursuant to defendants' suggestions at the face to face meetings, interrogatories which defendants consider ambiguous or otherwise unclear. Defendants further note that all of the depositions which plaintiffs contend are necessary involve witnesses who are either party plaintiffs or friendly to the plaintiffs, and, therefore that the assertedly essential information is entirely available to and under the control of the plaintiffs.

Defendants have also moved for summary judgment, arguing that expert testimony is essential to proof of plaintiffs' claims in this action, and, therefore, that plaintiffs' failure to timely produce any expert testimony with

respect to either liability or damages is fatal to such claims.

In response to defendants' motions, plaintiffs have moved for a ruling on their discovery motions of July, 1994, and have, for the first time, provided the certifications required by the local rules of civil procedure and this Court's orders that counsel have met face to face and were unable to resolve the remaining discovery disputes. (*See*, Plaintiffs' Cross-Motion for Ruling on Outstanding Discovery Motions, (Doc. #59), Exh. E).

With respect to the substance of defendants' motions for summary judgment and for sanctions, however, plaintiffs have not challenged defendants' underlying contention that expert testimony is essential to proof of their claims, have not otherwise responded to defendants' contentions concerning their need for additional discovery, and to defendants' contentions concerning plaintiffs' control over the evidence to be adduced at the depositions noted in their motion for extension of time to produce expert reports. Moreover, even in response to defendants' motions and facing the threat of summary disposition of their claims, plaintiffs have proffered no reason or explanation for their failure to obey the scheduling order. Instead, plaintiffs repeat their general statements that unspecified discovery sought from defendants is essential to production of expert reports. Significantly, plaintiffs have not sought denial of or a delay in the Court's ruling on defendants' summary judgment motion by serving a motion pursuant to Fed. R. Civ. P. 56(f) and submitting the affidavits therein required.

II. APPLICABLE LEGAL STANDARDS

A. Discovery Motions and Sanctions for Failure to Obey Scheduling Orders

Generally, all matters concerning the conduct of discovery, including granting or denying motions relating thereto, are vested in the sound discretion of the trial court and cannot be disturbed except upon a showing of abuse of discretion. *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81 (3rd Cir. 1987).

Likewise, the trial court has broad discretion under Fed. R. Civ. P. 37(b)(2) to impose appropriate sanctions for failure to obey orders entered pursuant to Rule 26(f). *Frame v. S-H, Inc.*, 967 F. 2d 194 (5th Cir. 1992); *Shipes v. Trinity Industries*, 987 F.2d 311 (5th Cir. 1993).

More specifically, preclusion of expert testimony is an appropriate sanction where plaintiffs' failure to comply with discovery orders does not result from a good faith inability to timely produce the required information. *Higginbotham v. Volkswagenwerk Aktiengesellschaft*, 551 F. Supp. 977 (M. D. Pa. 1982), *aff'd* 720 F. 2d 662 (3rd Cir. 1983), *cited with approval* in *Hagans v. Henry Weber Aircraft Distributors, Inc.*, 852 F.2d 60 (3rd Cir. 1988).

B. Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to judgment as a matter of law."

To defeat summary judgment, an issue of fact in dispute must be both genuine and material, *i.e.*, one upon which a reasonable factfinder could base a verdict for the non-moving party and one which is essential to establishing the claim. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). When considering a motion for summary judgment, the Court's sole function, with respect to the facts, is to determine whether there are any disputed issues and, if there are, to determine whether they are both genuine and material. *Id.* The Court's consideration of the facts, however, must be in the light most favorable to the party opposing summary judgment and all reasonable inferences from the facts must be drawn in favor of that party as well. *Tigg Corp. v. Dow Corning Corp*, 822 F.2d 358 (3d Cir. 1987).

Where the non-movant, usually the plaintiff, bears the burden of proof on the issue which is the subject of the summary judgment motion and is confronted by the defendant's argument that the facts established through the discovery process do not support the claim, that party must identify evidence of record sufficient to establish every element essential to the claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). *Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp.*, 812 F.2d 141 (3d Cir. 1987).

In order to defeat summary judgment, the party opposing the motion may not rest upon mere denials of the facts identified by the movant as supportive of its position, nor upon the vague and amorphous argument

that the record somewhere contains facts sufficient to support its claims. *Childers v. Joseph*, 842 F.2d 689 (3d Cir. 1987). Instead, the party resisting the motion for summary judgment is required to identify specifically the evidence of record which supports the claim and upon which a verdict in its favor may be based. *Id.*

If the movant succeeds in demonstrating that there are no genuine issues of material fact in dispute, the Court must then be satisfied that the moving party is entitled to judgment as a matter of law in order to grant the motion.

If the party defending against the summary judgment motion contends that a proper substantive defense to the motion is impossible based upon the existing record, and that additional discovery, *e.g.*, is required to complete the record, Fed. R. Civ. P. 56(f) provides the appropriate procedure for presenting such a procedural defense:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The determination of a motion for enlargement of time pursuant to Rule 56(f) rests with the discretion of the district court. *San Filippo v. Bongiovanni*, 30 F.3d 424, 432 (3d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 735, 130 L.Ed.2d 638 (1995). When faced with a Rule 56(f) motion, the Court should consider "what particular information is

sought; how, if uncovered, it would preclude summary judgment; and why it has not been previously obtained." *Lunderstadt v. Colafella*, 885 F.2d 66, 71 (3d Cir. 1989), *as quoted in, San Filippo*, 30 F.3d at 432 (*citing and quoting Contractors Ass'n. v. City of Philadelphia*, 945 F.2d 1260, 1266 (3d Cir. 1991)). Affidavits which merely reiterate the belief that the movant should be required to respond to discovery requests, without specifically identifying the information needed and how such information would preclude summary judgment, do not satisfy the requirements of Rule 56(f). *Gambrell v. Hess*, 777 F. Supp. 375 (D.N.J. 1991), *aff'd* 970 F.2d 898 (3rd Cir. 1992), *cert den.* 113 S.Ct. 272, 121 L.Ed. 2d 200 (1992).

C. "Crashworthiness" Theory of Liability and Need for Expert Testimony

In a crashworthiness case, plaintiffs must offer evidence tending to show, not that the allegedly defective design of the vehicle caused the accident, but rather that the defect in the car resulted in more severe injuries to plaintiffs than would have occurred if it had been properly designed. *Habecker v. Clark Equip. Co.*, 36 F.3d 278, 283 (3d Cir. 1994) (*Habecker III*), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1313, 131 L.Ed.2d 195 (1995); *Kupetz v. Deere & Co., Inc.*, ___ Pa. Super ___, ___, 644 A.2d 1213, 1218 (1994), *appeal denied*, 1994 Pa. Super. Lexis 1177 (April 26, 1994).

The essential elements of the claim that plaintiffs are required to prove under a crashworthiness theory are (1) the design of the car was defective; (2) a safer alternative design, practicable under the circumstances, existed when the car was designed; (3) the injuries, if any, that

would have been sustained had the safer alternative design been utilized; and (4) the injuries attributable to the defective design. *Habecker III*, 36 F.3d at 284; *Kupetz*, ___ Pa. Super. at ___, 644 A.2d at 1218; *McElyea v. Navistar*, 788 F.Supp 1366 (E.D. Pa. 1991).

Under Pennsylvania law, expert testimony typically is required in order to show a defective design in a complex product such as an automobile or to explain medical/physiological evidence such as cause of injuries and enhanced injuries. *See, e.g., Harkins v. Calumet Realty Co.*, 418 Pa. Super 405, ___, 614 A.2d 699, 707 (1992) ("The design, manufacture and necessary warnings/instructions associated with surgical cottonoids are not within the knowledge of the average layperson."); *Tennis v. Fedorwicz*, 140 Pa. Commw. 7, ___, 592 A.2d 116, 117 (1991) ("Generally, expert testimony is necessary to establish negligent practice in any profession. [E]xpert testimony is necessary whenever the subject matter of the inquiry involves special skills and training not common to the lay person."); *Dion v. Graduate Hosp.*, 360 Pa. Super 416, ___, 520 A.2d 876, 881 (1987) ("In a complex case, a jury, in order to reach an intelligent conclusion, is dependent on expert testimony. . . . Unless the jury is comprised of experts in the field, the verdict is based on mere conjecture. Such a verdict is worthless."). *Cf. Cipriani v. Sun Pipe Line Co.*, 393 Pa. Super. 471, ___, 574 A.2d 706, 710 (1990), *appeal denied*, 527 Pa. 661, 593 A.2d 837 (1991), 527 Pa. 666, 593 A.2d 842 (1991), 527 Pa. 668, 593 A.2d 843 (1991) (for negligence claim, "expert testimony is not required when the matter under consideration is simple . . . and within the range of comprehension of the average juror.")

III. DISCUSSION.

A. Discovery Matters

Although difficulties regarding discovery in this action have been experienced and caused by both plaintiffs and defendants, the Court concludes that plaintiffs' motion for enlargement of time to produce expert reports and response to the motion for summary judgment/cross motion for ruling on outstanding discovery motions fail to conform to the scheduling order in this case and do not establish good cause for further discovery.

In the first instance, plaintiffs have twice failed to follow the procedures explained in the scheduling order for obtaining extensions of discovery deadlines. Paragraph 14 of the February scheduling order provides, in part:

> The schedule set herein will not be extended unless good cause is shown. . . . Any request for extension:
>
> (b) if not agreed upon, shall be made by motion filed and served **at least ten (10) days prior to the expiration of the period sought to be extended (13 days if served by mail).**

Paragraph 15 states that any motion must disclose all prior extensions and "the precise reasons giving rise to good cause under [Fed. R. Civ. P.] 16(b)."[2] The October, 1994, scheduling order contains the same language. Thus, plaintiffs had sufficient notice of the time and manner for requesting extensions of time as well as the requirement

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[2] Fed. R. Civ. P. 16(b) provides, in part: "A schedule shall not be modified except upon a showing of good cause and by leave of the district judge. . . . "

of stating precise reasons establishing good cause for an extension.

Plaintiffs, however, do not even attempt to explain why they delayed so long in requesting a second extension of time for producing expert reports. If plaintiffs needed discovery from the defendants which they had not yet received in order to produce expert reports, they must surely have realized more than thirteen days prior to the May 1, 1995, deadline that they would be unable to comply with the scheduling order. Nevertheless, plaintiffs delayed notifying the Court and opposing counsel of their request for additional time until the time for producing expert reports had expired.

Finally, plaintiffs also failed to establish good cause for an extension by, *e.g.*, identifying the information needed from defendants in order to procure expert reports and stating specifically why such discovery is essential to producing expert reports.

The Court concludes, therefore, that because of plaintiffs failure to comply with the scheduling order and failure to establish good cause for further discovery under Rule 16(b), plaintiffs' motion for enlargement of time to produce expert reports will be denied.

B. Summary Judgment

Defendants' arguments in support of summary judgment focus primarily upon their contention that plaintiffs cannot, as a matter of law, establish their claims that the vehicle involved in the accident was defective and that the alleged defect(s) in the car caused or enhanced the

injuries suffered by Jessica and Gwyn Sitkoff absent expert testimony. Since the time for plaintiffs to produce expert reports set forth in the scheduling order governing this case has passed without the production of such reports, and, indeed, without the identification of any expert witnesses by plaintiffs, defendants further contend that plaintiffs are now precluded from offering expert evidence at trial unless the Court grants plaintiffs additional time to produce expert reports. Consequently, defendants argue, on a purely procedural basis, that they are entitled to judgment as a matter of law.[3] Substantively, defendants are actually asserting that plaintiffs lack sufficient evidence to establish each element of their crashworthiness claims.

To successfully defeat defendants' motion for summary judgment, plaintiffs must either demonstrate that the present record contains sufficient evidence to establish each element of their claims or must sufficiently support their implicit contention that defendants' motion should [be] denied, or a ruling thereon should be delayed to permit them to adduce the necessary evidence. If plaintiffs choose the latter course, they must here demonstrate, in accordance with Rule 56(f), that they were unable to procure expert reports within the period of time allotted and should now be granted additional time for expert discovery.

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[3] Since the Court has now concluded that plaintiffs will not be granted an extension of time to produce expert reports, defendants' procedural argument in support of summary judgment carries additional weight if the Court concludes that defendants' contentions concerning the need for expert testimony are accurate.

Plaintiffs, however, have chosen neither of the alternatives available to them to respond sufficiently to defendants' motion for summary judgment and have proffered no reason or explanation for their failure to do so. As noted, plaintiffs have not challenged defendants' core argument that expert testimony is absolutely essential to establishing their claims, and, therefore, they have not attempted to demonstrate that there is sufficient evidence of record to establish the essential elements of their crashworthiness claim in the absence of expert reports.

Moreover, plaintiffs have failed, both procedurally and substantively, to provide the Court with a basis for denying the motion for summary judgment or for delaying a ruling thereon in order to permit plaintiffs additional time to procure the essential expert opinion(s) and report(s).

In the first instance, plaintiffs failed to submit a Rule 56(f) motion and supporting affidavit to support their opposition to defendants' motion for summary judgment. Instead, plaintiffs filed a cross motion for a ruling on their discovery motions. Such a response is wholly inadequate. The unsworn assertions of counsel concerning the need or desire for additional discovery are an insufficient response to a motion for summary judgment challenging the plaintiffs' ability to prove their claims. As noted in *Pastore v. Bell Telephone Co. of Pennsylvania*, 24 F.3d 508 (3rd Cir. 1994), the Rule 56(f) requirement of an affidavit in support of a request for additional discovery is essential to demonstrate that the party seeking discovery is doing so in good faith and assists the Court in evaluating the merits of the request for additional discovery. *See*,

also, Radich v. Goode, 886 F. 2d 1391 (3rd Cir. 1989); *Committee for the First Amendment v. Campbell,* 962 F.2d 1517 (10th Cir. 1992); *First Chicago International v. United Exchange Co., Ltd.,* 836 F.2d 1375 (D.C. Cir. 1988).

Indeed, even a sworn affidavit, properly submitted in accordance with Rule 56(f), which fails to disclose specifically the need for additional discovery is insufficient to defeat summary judgment. *Gambrell v. Hess.*

In this case, plaintiffs failed to submit any affidavit at all in opposition to defendants' challenge to their ability to prove the elements of a crashworthiness case. Despite plaintiffs' access to the accident vehicle and the inspection thereof by tentatively identified experts, (*See,* Exh. H to Doc. #59 at 7, Exh. G to Doc. #59 at 10, 14), their access to the coroner's report concerning the death of Gwyn Sitkoff, (Exh. H at 20), their access to extensive medical records concerning the injuries to and treatment of Jessica Sitkoff, (Exh. H at 17-20), as well as their ability to memorialize their own and Jessica's knowledge concerning the extent of her injuries and how the accident occurred, plaintiffs have made no attempt to demonstrate, by means of even a partial expert report or otherwise, the injuries that resulted from the accident, or that the alleged defects in the accident vehicle caused or aggravated the injuries sustained in the accident, or to establish the likely extent of the injuries in the absence of the alleged defects.

In light of the extensive information readily available to the plaintiffs concerning the accident vehicle itself and the injuries suffered, it does not appear to the Court that

evidence essential to proving all of the elements of plaintiffs' claims is dependant upon discovery obtained from the defendants. Plaintiffs have not asserted, *e.g.*, that defendants control any evidence which would establish whether Jessica and Gwyn Sitkoff were injured because the car lacked a roll bar [or] other passenger protection device absent from the accident vehicle which would likely have prevented or lessened the injuries. Instead, plaintiffs' response to defendants' motion for summary judgment is limited to general claims of the need for discovery from defendant without any explanation of how defendants' unresponsiveness to plaintiffs' prior discovery requests prevented plaintiffs from offering expert evidence relating to their claims of injury.

Finally, plaintiffs have not articulated what action or inaction by defendants prevented plaintiffs from obtaining expert evidence with respect to the existence of a defect in the vehicle and the existence of an alternative feasible design. Information concerning various roll bar technologies and other passenger protection devices are generally available, yet plaintiffs have not shown why an expert could not form an opinion concerning feasible design alternatives without unidentified discovery sought from defendants.[4]

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[4] The Court further notes that any evidence about defendants' knowledge or desires or alternative design plans regarding roll bar technology simply has no bearing on the product liability crashworthiness claim. *See Habecker III*, 36 F.3d at 285-86.

IV. SUMMARY

Although plaintiffs have moved for an extension of time to produce expert opinion(s), they have not explained why expert medical evidence, at least, has not been obtained, have not demonstrated that some aspect of past discovery prevented them from obtaining expert evidence and have not established that further discovery will permit them to obtain the necessary expert evidence. Thus, we conclude that plaintiffs have not shown the good cause necessary for an enlargement of time to conduct discovery. For these reasons, plaintiffs' motion for an extension of time for expert discovery will be denied.

With respect to defendants' motion for summary judgment, plaintiffs concede, and the Court concludes, that expert testimony is necessary in this action to establish a defect which caused enhanced injuries as well as to establish the enhanced injuries suffered because of the alleged defective design. Plaintiffs have not, however, produced any expert evidence in support of their claim. Without expert testimony, and, indeed, without any affidavit or other evidence offered in opposition to defendants' motion for summary judgment, there is no evidence of record to support plaintiffs' crashworthiness claim.

Finally, the plaintiffs have failed to properly oppose summary judgment based upon the need for further discovery by submitting a motion and affidavit in accordance with rule 56(f), and have failed to articulate the precise reasons why additional discovery from defendants will support substantive opposition to defendants' motion for summary judgment. Hence, plaintiffs' cross

motion for ruling on outstanding discovery motions will be denied.

The Court ultimately concludes, therefore, that plaintiffs cannot establish a genuine issue of material fact regarding the injuries, if any, that would have resulted if a safer alternative design had been utilized in the accident vehicle rather than the allegedly defective design. Because plaintiffs cannot produce evidence to support each element of their claims, defendants are entitled to judgment as a matter of law. Thus, defendants' motion for summary judgment, will be granted and judgment entered in favor of the defendants.

Because the Court has concluded that plaintiffs' motion for enlargement of time and cross motion for ruling on outstanding discovery motions will be denied and that defendants' motion for summary judgment will be granted because of plaintiffs' failure to produce evidence relating to the injuries suffered, the pending motions to compel will be dismissed as moot. In addition, all other pending motions will be dismissed as moot and all third party claims, crossclaims, and counterclaims will be dismissed. An appropriate order follows.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

STEVEN D. SITKOFF, and BERNICE E. SITKOFF, Individually and as Parents and Natural Guardians of a Minor, Jessica Sitkoff, and as Administrators of the Estate of Gwyn Allison Sitkoff, Deceased Plaintiffs vs. BMW OF NORTH AMERICA, INC., and BAVARIAN MOTOR WORKS, A.G, Defendants/Third Party Plaintiffs vs. THE ESTATE OF ROSLYN SCHREIBER, THE ESTATE OF MYRON SCHREIBER, and THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Third Party Defendants	CIVIL ACTION NO. 93-3804

Troutman, S. J.

ORDER

(Filed Jul. 14, 1995)

AND NOW, this 13th day of July, 1995, upon consideration of Plaintiffs' Motion for Enlargement Of Time In

Which To Serve Expert Reports (Doc. #54) and defendants' response thereto, IT IS **ORDERED** that the motion is **DENIED.**

IT IS FURTHER **ORDERED** that, upon consideration of the Motion For Summary Judgment and for Sanctions of Defendants BMW of North America, Inc. And Bayerishce Motoren Werke Aktiengesellschaft (Doc. #55) and plaintiffs' response thereto, the motion is **GRANTED.**

IT IS FURTHER **ORDERED** that, upon consideration of Plaintiffs' Cross-Motion For Ruling On Outstanding Discovery Motions (Doc. #59) and defendants' response thereto, the motion is **DENIED.**

IT IS FURTHER **ORDERED** that, the Court having concluded that plaintiffs failed to sufficiently oppose defendants' motion for summary judgment, and therefore, the motion has been granted, Plaintiffs' Motion To Compel Full And Complete Discovery Responses From Defendant BMW of North America, Inc. (Doc. #30) and Plaintiffs' Motion To Compel Discovery Responses From Defendant Bavarian Motor Works, A.G., Pursuant To Fed. R. Civ. P. 37(a) and Local Rule 24(g) (Doc. #31) are **dismissed as moot.**

IT IS FURTHER **ORDERED** that the Motion Of The Third-Party Defendants, Estate of Rosyln Schreiber And Estate of Myron Schreiber, For Summary Judgment (Doc. #60) is **dismissed as moot.**

IT IS FURTHER **ORDERED** that all third-party claims, counterclaims, and crossclaims are **dismissed** without prejudice.

IT IS FURTHER **ORDERED** that judgment is entered in favor of Defendants and against Plaintiffs.

IT IS FURTHER **ORDERED** that the Clerk shall mark this action CLOSED for statistical purposes.

/s/ E. Mac Troutman
S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN D. SITKOFF and BERNICE E. SITKOFF, Individually and as Parents and Natural Guardians of a Minor, Jessica Sitkoff, and as Administrators of the Estate of Gwyn Allison Sitkoff, Deceased	:	CIVIL ACTION
Plaintiffs	:	E. Mac Troutman, J.
vs.	:	
BMW OF NORTH AMERICA, INC. and BAVARIAN MOTOR WORKS, A.G.	:	
Defendants and Third Party Plaintiffs	:	JURY TRIAL DEMANDED
vs.	:	
THE ESTATE OF ROSLYN SCHREIBER, THE ESTATE OF MYRON SCHREIBER, THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, JOHN DOE NO. 1, JOHN DOE NO. 2, and JOHN DOE NO.3	:	
Third Party Defendants	:	NO. 93-CV-3804

PLAINTIFFS' ANSWERS TO INTERROGATORIES

Plaintiffs Steven D. Sitkoff and Bernice E. Sitkoff, by their attorneys, hereby answer the following interrogatories which were served on them by Defendant BMW of North America, Inc. on September 9, 1993. Plaintiffs make these responses without prejudice to their right to amend, alter, or change these answers as their investigation and discovery continue.

1. State in detail the facts as to how you contend the occurrence took place.

Answer No. 1: On July 18, 1991, the vehicle, a 1988 BMW Model 325i convertible operated by Roslyn Schreiber, was traveling west on State Route 78, a four-lane highway in Berks County, Pennsylvania. In the BMW were Jessica Sitkoff, seated in the right front seat, wearing her seatbelt and shoulder harness, and her sister, the late Gwyn Allison Sitkoff, seated in the right rear seat, wearing her seatbelt and shoulder harness.

At approximately 12:30 p.m., the vehicle's left wheels and tires entered a depressed area of the median strip near station marker 3/40, causing Roslyn Schreiber to lose control of the vehicle. As a result, the vehicle veered across the right westbound lane, struck the right guardrail, and left the highway. The left side of the vehicle then struck a tree. Roslyn Schreiber and Myron Schreiber, the left rear passenger, from the BMW, were thrown from the vehicle.

The vehicle came to rest, inverted, at the bottom of an embankment. Because there was no roll bar to protect the passengers in the event of a roll over by providing a relief area between the

top of the BMW and the ground, Gwyn Allison Sitkoff was killed when her head was crushed between the inverted vehicle and the ground. Jessica Sitkoff, who remained belted into the right front passenger seat, was injured.

2. Identify all persons who were eyewitnesses to all or any part of the occurrence, state the location of such person at the time of the occurrence, identify all persons, including police officers and emergency medical services personnel, who arrived at the scene of the occurrence within four hours after its happening, and state the approximate time that each arrived at the accident scene.

Answer No. 2: Defendants are referred to those individuals identified in the police, medical, and fire and rescue company reports furnished by Plaintiffs in response to Defendants' Request for Production of Documents. In particular, Defendants are referred to those documents produced in Plaintiffs' Responses Nos. 16, 17, 18 and 29, which Plaintiffs incorporate here by reference. Unless detailed in their reports, the time that each of these individuals arrived at the accident scene and their location at the time of the occurrence are unknown to Plaintiffs.

Plaintiffs have been informed, and therefore state upon information and belief, that the following additional individuals may have been present at the accident scene within four hours of the occurrence:

1. Oscar Klinesmith, Chief of the Kempton Fire Department.

2. Anita Miracle, Lot 54, Hidden Lake Park, Graham, NC 27253, 919-578-848. Ms. Miracle was a resident of the nearby Schumaker

Mobile Home Park at the time of the occurrence.

3. Identify each transcript or recording of testimony in any proceeding arising out of the occurrence, describe the nature and the date of each such proceeding, and identify the person who recorded the testimony for each such proceeding and the present custodian of each transcript or recording thereof.

Answer No. 3: Other than those contained in the papers filed in this action, Plaintiffs know of no statements made under oath or affirmation regarding the occurrence.

4. Identify all persons who have performed any investigation on your behalf in connection with the occurrence, and identify all persons who have investigated the occurrence, its consequences, or the vehicle.

Answer No. 4: Plaintiffs have identified testifying expert witnesses in response to Defendants' Interrogatory No. 24 below, pursuant to Fed.R.Civ.P. Rule 26(b)(4)(A)(i).

Additional, preliminary investigations were conducted for Plaintiffs by:

Howard G. Shortlidge
3404 Humpton Road
Thorndale, PA 19372.

No other investigation has been conducted that was not performed in anticipation of litigation or protected from disclosure by the attorney work product doctrine.

5. Identify each person who has given you a signed or recorded statement relating to the occurrence, state the

date each such statement was taken, identify the person taking each such statement and identify the present custodian of copies thereof.

Answer No. 5: Plaintiffs object to this interrogatory to the extent it seeks documents protected by attorney-client privilege or the attorney work-product doctrine. Notwithstanding these objections, and without waiving them, Plaintiffs will make the following witness statements available to Defendants:

Statement of John R. Crepeau, 32 Holland Avenue, Woonsocket, RI 02895. Telephone interview conducted by Plaintiffs' investigator, Howard G. Shortlidge, on September 14, 1991. Available for inspection at the office of Plaintiffs' counsel.

Statement of Douglas Rizzuto, 1651 Linden Street, Allentown, PA 18102. Statement taken by Howard G. Shortlidge on August 18, 1991. Available for inspection at the office of Plaintiffs' counsel.

Statement of Marianne Magee, 1651 Linden Street, Allentown, PA 18102. Statement taken by Howard G. Shortlidge on August 18, 1991. Available for inspection at the office of Plaintiffs' counsel.

6. If you are aware of any oral or written statements relating to the occurrence and/or the vehicle made at any time by any alleged agent or representative of the defendants, state the substance of each such statement, state the place where and the date when each such statement

was made, identify the person who made each such statement, identify all persons who were present at the making of such statements, state whether each such statement was oral or written and, if written, identify the documents containing it and the custodians thereof.

> **Answer No. 6:** Plaintiffs object to this interrogatory on the grounds that such information is more within the knowledge and control of Defendants than Plaintiffs.

7. State whether you have entered into any release, settlement or other agreement, formal or informal, whether reduced to writing or not, pursuant to which the liability of any person for any injury or damage arising out of the occurrence has been limited, reduced or released in any manner, and if so, state the person(s) with whom each such agreement was made, the date each such agreement was made, and describe the terms of each such agreement.

> **Answer No. 7:** This information has been provided in Plaintiffs' Response No. 21 to Defendants Request for Production of Documents, which is incorporated herein by reference.

8. State whether you have made claims and/or filed any lawsuits or judicial proceedings against any person for liability arising out of the occurrence. If your answer is in the affirmative, identify: the plaintiffs or claimants in such matters; the defendants or persons against whom such claims were asserted; your attorneys in such matters; the attorneys for the defendants or the persons against whom such claims were asserted; your experts; experts designated by the defendants or the persons

against whom your claims were asserted; the style, caption, court and number of such lawsuits; and the status of the claim or lawsuit, including whether the claims were resolved by trial or settlement. Please specify the amounts of any verdicts or settlements.

Answer No. 8: This information has been provided in Plaintiffs' Response No. 20 to Defendants Request for Production of Documents, which is incorporated herein by reference.

9. Identify all photographs, plats, diagrams, or other documents relating to the vehicle, the occurrence or the consequences thereof, state the nature and subject matter of each such document and identify the custodian of each such document.

Answer No. 9: This information has been provided by Plaintiffs' Response to Defendants' Request for Production of Documents as a whole, which is incorporated herein by reference.

10. If you contend that the vehicle was defective in whole or in part and that such defect(s) caused or contributed to the occurrence or the damages of which you complain, identify each part of the vehicle which you contend was defective by stating the part number and name or colloquial term for each part and describe how each such defect caused or contributed to the occurrence or the damages.

Answer No. 10: These contentions are explained in detail in Plaintiffs' Complaint, Counts I through IV of which are incorporated herein by reference.

The principal defects were the failure to equip the BMW with a roll bar, adequately strengthened A-pillars or other, similar occupant protection devices, which caused it to be uncrashworthy and incapable of providing occupant protection in the event of a foreseeable roll over. The vehicle was also defective in that its interior furnishings, especially its passenger restraint systems, were not properly designed to afford the passengers adequate crash survivability and protection from foreseeable kinematic forces in the event of a crash. As a result of the defects in the vehicle, the plaintiff's and decedent's injuries were either enhanced or caused in the first place.

Plaintiffs will address these issues with more specificity through expert testimony.

11. If you claim that any of the parts identified in answer to Interrogatory No. 10 was defectively designed, describe in detail the design defect for each such part and how such defective design caused or contributed to the occurrence or the damages.

Answer No. 11: Plaintiffs incorporate their response to Interrogatory No. 10, above.

12. If you claim that any of the parts identified in answer to Interrogatory No. 10 was defectively manufactured, describe in detail the nature of the manufacturing defect for each such part, and how such defective manufacture caused or contributed to the occurrence or the damages.

Answer No. 12: Plaintiffs' investigation has not yet uncovered any manufacturing defects that

may have caused or enhanced the injuries suffered by Plaintiffs and Plaintiffs' decedent. However, since Plaintiffs' investigation is on-going, Plaintiffs expressly reserve the right to amend this answer should new evidence be discovered.

13. If you claim that any of the parts identified in answer to Interrogatory No. 10 was defectively assembled, describe in detail the nature of each such assembly defect and how such assembly defect caused or contributed to the occurrence or the damages.

Answer No. 13: Plaintiffs' investigation has not yet uncovered any assembly defects that may have caused or enhanced the injuries suffered by Plaintiffs and Plaintiffs' decedent. However, since Plaintiffs' investigation is on-going, Plaintiffs expressly reserve the right to amend this answer should new evidence be discovered.

14. If you claim that any of the parts identified in answer to Interrogatory No. 10 was defectively tested or inspected, describe in detail the nature of each such testing or inspection defect and how such testing or inspection defect caused or contributed to the occurrence or the damages.

Answer No. 14: These contentions are explained in detail in Plaintiffs' Complaint, Counts I through IV of which are incorporated herein by reference.

Plaintiffs contend that the vehicle as a whole, and therefore each of its relevant components, was defectively tested in that Defendants failed to adequately determine what injuries the vehicle's occupants were likely to sustain in the

foreseeable event of a roll over, given the vehicle's lack of roll-over protection and inadequate passenger restraint and protection systems.

15. State all facts in support of your claims for punitive damages. Identify all persons with personal knowledge and such facts and all documents which pertain, refer or relate to such facts.

Answer No. 15: These contentions are explained in detail in Plaintiffs' Complaint, Counts I through IV of which are incorporated herein by reference.

Long prior to the date of this accident, defendants and employees of defendants as yet unknown knew that convertibles without roll bars or other occupant protection represented an extreme likelihood of causing serious personal injury or death in the event of a roll over.

Long prior to this accident, defendants and employees of defendants as yet unknown knew that a myriad of circumstances, wholly unrelated to the dynamic stability of the vehicle, could result in a roll over.

Defendants and employees of defendants as yet unknown knew that convertibles as a group of vehicles were dangerous in roll over situations because of the lack of roll over protection in the form of roof support.

Defendants and employees of defendants as yet unknown knew long prior to the accident that front seat occupants could be prevented from having serious personal injury or death as a result of significant strength being built into the A pillar.

Defendants and employees of defendants as yet unknown knew, as a result of prior experience and knowledge prior to the accident, that rear seat occupants could be protected similarly by the establishment of a strong roll bar protection, either of the fixed or pop-up variety.

Solely as a result of design and marketing considerations, and not by any consideration whatsoever of the long prior history and body of knowledge of the dangers of convertibles without roll bars, defendants and employees of defendants as yet unknown failed to provide a roll bar or other occupant protection from foreseeable roll overs in any form in the 1988 BMW 325i convertible, knowing that it was inevitable that a person or persons in the position of the plaintiffs and the plaintiffs' decedent would inevitably suffer serious personal injury or death as a result of foreseeable roll overs.

Despite defendants' actual knowledge of actual risk and the actual means of preventing serious personal injury or death or the means of lessening the same, defendants knowingly, consciously, deliberately, unjustifiably, recklessly, wantonly and outrageously failed to include a fixed or pop-up roll bar or other roll over occupant protection in the 1988 model of the BMW 325i convertible.

Notwithstanding the defendants' actual knowledge of the serious risks, and indeed likelihood, of serious bodily injury or death and notwithstanding the defendants' actual knowledge of its design of a pop-up roll bar system, defendants never warned plaintiffs' decedents or others, such as the owners and operators of the BMW, that such a design was contemplated and that

the absence of a fixed roll bar was tantamount to the likelihood of serious personal injury or death in the event of foreseeable roll over.

The actual conduct of the defendants in ignoring all prior information, exposing the plaintiffs' decedent and the plaintiffs to serious bodily injury or death was so outrageous as to justify the imposition of punitive damages.

Given the on-going nature of Plaintiffs' investigation and the negligible discovery provided by Defendants, Plaintiffs expressly reserve the right to supplement or amend this answer as their investigation and discovery continue.

16. State whether you or any person on your behalf has inspected the vehicle or any of its parts at any time and, if so, state the date and place of each such inspection, identify the part(s) inspected, identify each person(s) who participated in such inspection, and identify each document which refers or relates to each inspection.

Answer No. 16: Plaintiffs object to this interrogatory to the extent it seeks undiscoverable materials prepared in anticipation of litigation or information protected by the attorney work-product doctrine and attorney-client privilege. Notwithstanding this objection, and without waiving it, Plaintiffs have conducted the following inspections of the vehicle and have made available the following, discoverable documents relating to these inspections:

1. Inspection by Howard Schortlidge on either August 9, 1991 or August 19, 1991, presumably at Reinert's Towing. Documented by 16 photographs produced in Plaintiffs'

Response No. 8 to Defendants' Request for Document Production.

2. Inspection by John Brown, Esq., on January 22, 1992, presumably at Reinert's Towing. Documented by 48 photograph and a videotape produced in Plaintiffs' Response No. 8 to Defendants' Request for Document Production.

3. Inspection by Arthur Alan Wolk, Esq., Peter C. Bertelson, D.Sc., and Andrew N. Gilberg at Orsini's Collision on February 3, 1994. Photographs of this inspection were taken and will be produced once Plaintiffs' experts return them to Plaintiffs.

17. State whether you or any person on your behalf has performed (or intends to perform) any kind of test, calculation or other procedure to determine, directly or indirectly, the performance of the parts of the vehicle which you contend were defective and, if so, with respect to each such test, calculation or other procedure, state the date and describe precisely what kind of test, calculation or other procedure was performed using words of art if necessary) identify each person who designed or performed same and his qualifications; identify each other person present and state his qualifications; identify the parts of the vehicle involved; Identify any photograph, film, notes, report or other document which was taken or produced as a result of such test, calculation or procedure and dates made; and describe the testing process and all equipment or apparatus used in making same and the function of each.

Answer No. 17: Plaintiffs have not determined at this time whether they will conduct tests on the vehicle, but reserve the right to do so in the

future as their investigation continues. Should Plaintiffs so decide, Plaintiffs will supplement this answer if appropriate.

18. If repairs or alterations were made to the vehicle or parts of the vehicle were replaced at any time between the date of its first retail purchase and the present, identify all persons who performed each such repair, alteration or replacement, state the date of each repair, alteration or replacement, state the precise nature of each such repair or alteration or replacement and identify each document which refers or relates to each such repair, alteration or replacement.

Answer No. 18: To Plaintiffs' knowledge, no repairs or alterations other than the removal of the right, rear, passenger-restraint system have been made to the vehicle since the time of the occurrence and the present. Those passenger restraint system parts which were removed are currently in Defendant's possession and are detailed in Plaintiffs' Response No. 15 to Defendants Request for Production of Documents, which is incorporated by reference.

Plaintiffs, upon information and belief, state that no repairs relevant to Plaintiffs' claim in this action were made prior to the date of the occurrence. Since the vehicle in question was owned by Roslyn Schreiber, this request is better directed to Thomas H. Dinkelacker, Esq., Snyder, Dimmich & Guldin, P.C., 2112 Tilghman Street, Allentown, Pennsylvania, counsel for the Schreiber estates.

19. Identify all persons who performed routine maintenance (as opposed to repairs or replacement of parts) on the vehicle at any time between the date of its

first retail purchase and the present, state the date on which any such routine maintenance was performed, and identify any documents which refer or relate to such routine maintenance.

Answer No. 19: No routine maintenance has been performed on the vehicle from the time of the occurrence to the present.

Plaintiffs have no knowledge of maintenance performed prior to the date of the occurrence. Since the vehicle in question was owned by Roslyn Schreiber, this request is better directed to Thomas H. Dinkelacker, Esq., Snyder, Dimmich & Guldin, P.C., 2112 Tilghman Street, Allentown, Pennsylvania, counsel for the Schreiber estates.

20. If you contend or have contended that any person not a party to this action was negligent or was in any manner responsible for the injuries and damages about which you complain, identify such person(s) and state the manner in which such person(s) are liable for any injuries or damages.

Answer No. 20: As to the specific claims made by Plaintiffs in this case, i.e. the vehicle's lack of crashworthiness, Plaintiffs contend that Defendants are solely negligent.

21. If you contend that there exists a feasible design alternative to the vehicle or the components thereof, please describe fully such design and set forth all facts and identify all documents which support that contention.

Answer No. 21: Plaintiffs contend that it was feasible for Defendants to have installed either a

fixed or pop-up roll bar in the vehicle and that the design of such roll bars was well known within the automotive industry and therefore was or should have been well known to Defendants. Defendants also should have installed a strengthened A-pillar and seatbelt pretensioners in the vehicle. Plaintiffs further contend that the installation of such devices and others would have prevented or at least lessened the injuries sustained by Plaintiffs.

Plaintiffs' experts will attest to specific design alternatives at the appropriate time.

22. Identify separately all damages being claimed from the defendants including, but not limited to: all medical and hospital and nursing statements and all other statements relating to or arising from the rendering of medical assistance or treatment to Jessica Sitkoff and Gwyn Allison Sitkoff; all claimed compensation for loss of income and services provided by Jessica Sitkoff and Gwyn Allison Sitkoff; all other claimed economic damages; all claimed non-economic damages; and all other damages of any nature whatsoever which you contend resulted from the occurrence. Include in your answer the basis and methods of calculation for each element of damage and identify all persons with personal knowledge of facts supporting each claim and the identity of all documents relevant to your claimed damages.

Answer No. 22: The nature of the damages claimed by Plaintiffs is set forth in paragraphs 11 through 17 of Plaintiffs' Complaint, which is incorporated herein by reference.

Defendants are also referred to the medical and funerary bills produced by Plaintiffs in

Response No. 25 to Defendants Request for Production of Documents, which are incorporated herein by reference. Plaintiffs will supplement these documents with others as they become available.

With respect to claimed compensation for loss of income and services provided by Jessica Sitkoff and Gwyn Allison Sitkoff and other claimed economic and non-economic damages, Plaintiffs' experts will testify under the authority of *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), at the appropriate time.

23. If you contend that the defendants made any admissions or declarations against interest, identify the person making such statements, the date of such statements, all persons present when the statements were made, state the admission or declaration against interest which was made, and identify all documents referring or relating to such statements and all persons with personal knowledge of those statements.

Answer No. 23: Plaintiffs object to this interrogatory on the grounds that such information is more within the knowledge and control of Defendants than Plaintiffs.

24. Identify all experts whom you propose to call as witnesses at the trial of this case, state the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, give a summary of the grounds for each such opinion, and identify all reports, resumes, statements and documents received from each such expert concerning the subject matter of this case.

Answer No. 24: Plaintiffs have not yet conclusively determined the experts they will call at trial and will supplement their answer as this decision is made.

At present, Plaintiffs intend to call Peter C. Bertelson, D.Sc., and Andrew N. Gilberg to testify on the subjects of occupant protection, crashworthiness, roll bar design, and the suitability and practicality of installing a roll bar in the vehicle. Copies of their curricula vitae are attached.

25. Identify each person or entity in whose possession the vehicle and any of its parts has been and who has owned the vehicle and any of its parts from the time of the occurrence to the present, state the location at which the vehicle and any of its parts were stored while in the possession and/or ownership of each such person or entity, state the date upon which each such person or entity acquired possession and/or ownership and transferred possession and/or ownership, state the present location of the vehicle and any of its parts and identify all documents relating to the location of the vehicle and any of its parts since the occurrence.

Answer No. 25: Defendants are referred to Plaintiffs' Response No. 15 to Defendants Request for Production of Documents, which is incorporated herein by reference.

26. State whether any parts have been removed from the vehicle since the date of the occurrence and, if so, identify the parts removed by part name and number, state the time where and the place when each such part was removed, identify each person who removed each such part, identify all persons present at the removal of

each such part, identify the custodian of each such part, and identify all documents which relate to any removal of parts from the vehicle.

Answer No. 26: Plaintiffs incorporate their response to Interrogatory No. 25, above.

27. Identify all persons whom you believe to have, or who claim to have, a subrogation interest in the outcome of this litigation, and for each such person, state the dollar value of that subrogation interest, and identify all documents relating to each such subrogation interest.

Answer No. 27: It is possible that Liberty Mutual, as no fault carrier for the Sitkoffs, is subrogated. The amount is unknown.

28. If you know of the existence of any demonstrative evidence relative to the occurrence or the damages of which you complain which you have not identified in response to answers to preceding Interrogatories, state the nature, subject matter, date produced or obtained, and the identity of the present custodian of each item.

Answer No. 28: Plaintiffs have not yet made this determination and will supplement this answer in the future, if appropriate.

29. Describe all injuries sustained by Jessica Sitkoff and Gwyn Allison Sitkoff as a result of the occurrence, including: a description of the nature of each injury; the exact location of each bodily injury; the identity of each person who treated or examined Jessica Sitkoff and Gwyn Allison Sitkoff; the nature of such examinations or treatments identified above and the reasons therefor; and the identity of all hospitals or other institutions in which

Jessica Sitkoff or Gwyn Allison Sitkoff was hospitalized or treated.

Answer No. 29: Defendants are referred to the extensive medical records produced by Plaintiff in Response No. 25 to Defendants Request for Production of Documents, which are incorporated herein by reference.

Plaintiffs expressly reserve the right to supplement this answer in the future should additional information become available.

30. Identify all persons not previously identified who have personal knowledge of the facts material to the answers to Interrogatories 1 through 29, indicating as to each such person which Interrogatory responses involve facts within each such person's personal knowledge, and identify each document containing facts material to the responses to said Interrogatories.

Answer No. 30: Plaintiffs know of no one at this time; however, Plaintiffs will supplement this answer at a later date if appropriate.

31. Identify all documents, not previously identified, which you contend support your liability and damages claims.

Answer No. 31: Plaintiffs know of no discoverable documents in their possession that have not already been produced; however, Plaintiffs will supplement this answer at a later date if appropriate.

Respectfully submitted,

WOLK & GENTER

/s/ Arthur Alan Wolk
Arthur Alan Wolk, Esq.

1710-12 Locust Street
Philadelphia, PA 19103
(215) 545-4220

Attorneys for Plaintiffs

Dated: June 23, 1994

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of June, 1994, a copy of the foregoing Plaintiffs' Answers to Interrogatories was mailed, first-class postage prepaid, to:

William F. Kiniry, Jr., Esquire
PIPER & MARBURY
Two Penn Center Plaza
Suite 1500
Philadelphia, PA 19102

/s/ William G. Wolk
William G. Wolk

Attachment to Answer No. 24

[LOGO]
Teknacon

ANDREW N. GILBERG

Education:

Renssalaer Polytechnic Institute Troy, NY, BS in Engineering Science	1970
University of Michigan, Ann Arbor MS in Mechanical Engineering	1971

Employment:

Highway Safety Research Institute Ann Arbor, Research Assistant	1970-71
Ford Motor Company Research Engineer C	1971-72
Competition Press and Autoweek Magazine, Engineering Editor	1972-73
Ford Motor Company Research Engineer A	1973-78
Versitech Corporation Senior Project Engineer	1979-82
Forensic Engineering, Inc. Project Manager	1982-86
Teknacon Corporation Owner and General Manager	1986-

Experience:

Automotive engineering – passenger cars, light and heavy trucks, recreational vehicles, racing cars, motorcycles
Vehicle accident reconstruction
Automotive and heavy equipment fire analysis
Field testing of vehicles
Computer simulation of vehicle dynamics
Driver behavior and human factors research
Safety research
Product evaluation, product test and technical analysis
Construction, maintenance and repair of motor vehicles

Registration:

Professional Engineer, Georgia #12978 1981

Memberships:

Tau Beta Pi, engineering honor society 1969
Society of Automotive Engineers (SAE) 1979

Honors:

Westinghouse Science Talent Search Winner

Attachment to Answer No 24

CURRICULUM VITAE

PETER CLARK BERTELSON, D.Sc., P.E.

30325 Ponds View Drive
Franklin, Michigan 48025
(313) 626-5788

VITAL STATISTICS

U.S. Citizen; Born February 29, 1928, LaCrosse, Wisconsin; Social Security No.: 390-22-7012.

PRESENT POSITION

Engineering Consultant

EDUCATIONAL BACKGROUND AND DEGREES

1962 Doctor of Science (D.Sc.) in Mechanical Engineering
Washington University, St. Louis, Missouri

1956 Oak Ridge School of Reactor Technology
U.S. Atomic Energy Commission, Oak Ridge, Tennessee

1955 Master of Science (M.S.) in Engineering Mechanics
University of Michigan, Ann Arbor, Michigan

1948 Bachelor of Science (B.S.) in Mechanical Engineering
Carnegie Institute of Technology, Pittsburgh, Pennsylvania

PROFESSIONAL ENGINEERING REGISTRATIONS

1956 Michigan

1958 Missouri

1958 Indiana

EXPERIENCE

1984 *Engineering Consultant*
Franklin, Michigan

1983-1984 *Director of Transportation Systems*
American Standards Testing Bureau, Inc.
New York, New York

1979-1982 *Chief Engineer,* Wheel and Brake Division
The Budd Company
Troy, Michigan

1978-1979 *Director Technical Sales,* Graftek Division
Exxon Enterprises
Raleigh, North Carolina

1976-1978 *Manager, Design and Analysis,* then *Technical Director*
DAB Industries
Troy, Michigan

1970-1976 *Engineering Consultant*
30325 Ponds View Drive
Franklin, Michigan

1968-1970 *Visiting Professor of Engineering*
Oakland University
Rochester, Michigan

1966-1968 *Manager,* Technical Review and Impact Dynamics Departments
Automotive Safety Research Office, Ford Motor Company
Dearborn, Michigan

1962-1966 *Principal Engineer,* Product Research and Systems Research Offices
Ford Motor Company
Dearborn, Michigan

1958-1962 *Graduate Student*
Washington University
St. Louis, Missouri

1957-1961 *Project Manager*
Internuclear Company
Clayton, Missouri

1956-1957 *Senior Engineer*
General Dynamics Corporation
Groton, Connecticut

1955-1956 *Student*
Oak Ridge School of Reactor Technology
Oak Ridge, Tennessee

1955-1957 *Senior Engineer,* Electric Boat Division
General Dynamics Corporation
Groton, Connecticut

1954-1955 *Graduate Student*
University of Michigan Department of
Engineering Mechanics
Ann Arbor, Michigan

1951-1954 *Lieutenant*
Gunnery Officer on USS Maddox (DD-731)

1948-1951 *Project Engineer*
Ford Motor Company
Dearborn, Michigan

1945-1948 *Student*
Carnegie Institute of Technology
Pittsburgh, Pennsylvania

MEMBERSHIP IN HONOR SOCIETIES

Pi Tau Sigma
Theta Tau
Tau Beta Pi

HONORS

Nierenberg, Mesta, and Mellon Scholarships
Secretary of Navy – Commendation Medal from Commander Seventh Fleet
Directed the team winning the competition to design a highest-flux test reactor for the Atomic Energy Commission
Selected for DOD-TACOM R & D award for track improvement

TECHNICAL AFFILIATIONS

Society of Automotive Engineers
American Society of Engineering Education
American Society of Mechanical Engineers
Industrial Mathematics Society
American Nuclear Society

COMMITTEE MEMBERSHIPS

Wheel Standards Committee, Society of Automotive Engineers
Commercial Vehicle Chassis Committee, Society of Automotive Engineers
Participant, Ben Franklin Robotics Institute at Carnegie Mellon University, 1984-1985
Member, Radio Interference Committee, Society of Automotive Engineers
Executive Committee, Industrial Mathematics Society

PATENTS

1. U.S. Patent No. 3,362,194; "Friction Clutch with Vibration Damper," November 23, 1965, (Co-inventor).

2. U.S. Patent No. 3,428,362; "Seat Belt Utilization Indicator," October, 1967, (Co-inventor).

3. U.S. Patent No. 3,802,271; Method of Acoustically Analyzing Particles in a Fluid, April 9, 1974.

4. U.S. Patent No. 4,519,591 (and ten other countries), "Non-Metallic Leaf Spring Structure," June 27, 1983.

5. U.S. Patent No. 821,167 and Canada Patent No. 501,991, "Casket Liner," 1986.

6. U.S. Patent Filing #B99457112. "Method of Preventing CO Asphyxiation," April 21, 1988.

7. U.S. Patent No. 4,788,757 "Casket Assembly," 1988.

8. U.S. Patent No. 4,300,978 "Burial Vault," 1989.

9. U.S. Patent No. 5,073,315 "Methods for Making Fiber Reinforced Wheels and Other Structural Moldings," December 17, 1991.

10. U.S. Patent No. 5,020,857 "Fluid Dynamic Restrictor for Lowering Dump Truck Beds," June 4, 1991.

PUBLICATIONS

1. "Advanced Engineering Test Reactor," Journal of the American Nuclear Society, 1958.

2. U.S. Atomic Energy Commission Special R & D Report KAPL-1745, "S3G/S4G Shield Design Description," 1957, (Co-author).

3. "Nuclear Engineering," article (P. N. Powers, co-author) in *Encyclopedia Britannica,* 1960.

4. "Heat Transfer in Porous Media," Doctoral dissertation submitted to Washington University, 1962.

5. "New Developments in RFI Suppression," Society of Automotive Engineers Paper 740113, 1974.

6. "Advanced Propulsion Systems for Surface Vehicles," Appendix G, Report P-1073, Institute for Defense Analyses for Advanced Research Projects Agency, U.S. Department of Defense, 1978.

TECHNICAL RESEARCH REPORTS

1. U.S. Atomic Energy Commission, Oak Ridge National Laboratory, Investigation of a Natural Circulation Submarine Reactor Power Plant, 1965 (Co-author).

2. U.S. Atomic Energy Commission, AT (11-1)-579, "An Advanced Engineering Test Reactor," March 1958, (Co-author).

3. Detroit Arsenal – Ordnance Tank Automotive Command, "Design of a Radiological Vehicle," 1958, (Co-author).

4. Atomics International Division, North American Aviation, Inc., "A Review of Shielding for Moderator Handling in the Hallam Nuclear Power Facility," 1959.

5. Allison Division, General Motors Corporation, (INT-42), "Evaluation of a Propulsion Concept," 1959.

6. U.S. Atomic Energy Commission, AT(11-1)-688, "Experimental and Analytical Studies of Reflector Control for the Advanced Engineering Test Reactor," October 1959, (Co-author).

7. U.S. Atomic Energy Commission, AT(11-1)-688, "AETR Mockup Design," 1959, (Co-author).

8. U.S. Atomic Energy Commission, Atomic Power Development Associates, Inc., AT(1101)-800, APDA-133, "Fast Reactor Core Design Parameter Study," 1959, (Co-author).

9. U.S. Atomic Energy Commission, "Small-Size Pressurized Water Reactor Conceptual Design," Report (TID-8526) of the Dairyland Power Cooperative Plant built at Genoa, Wisconsin, 1960, (Co-author).

10. University of Missouri, "Hazards Information for the University of Missouri Research Reactor," 1960, (Co-author).

11. Washington University, "Heat Transfer in Porous Media," Doctoral dissertation, 1962.

12. Ford Motor Company, Engineering Staff, Design-guide texts for vehicle Frame, Clutch, and Fuel Systems, 1965-1966.

13. Burroughs Corporation, "Design of an Ink Jet Printer," 1974.

14. Burroughs Machines, Limited, "Cost Reduction in Document Encoders," 1975.

15. United Technologies, Inc., "Ship-Powerplant Interface Requirements and Constraints," 1976.

16. United Technologies, Inc., "Technology of U.S. and Foreign Marine Reduction Gear," 1976.

17. DAB Industries, "Proposal for the Manufacture of Aluminum Bearings," 1977.

18. The Budd Company, "Aluminum Hub Investigation," 1979.

19. The Budd Company, "European Developments in Steel, in Wheels and in Tires," 1981.

RESEARCH

1. U.S. Atomic Energy Commission – Oak Ridge National Laboratory, Study of A Natural Circulation Submarine Reactor, June-September 1956, (Senior Engineer).

2. U.S. Navy – U.S. Atomic Energy Commission – General Dynamics Corporation, S3G/S4G Preliminary Design, Shield Design, Refueling and Reactor Service Studies, 1955-1957, (Senior Engineer).

3. U.S. Atomic Energy Commission AT (11-1)-579 Internuclear Co., Development of concepts for high-flux testing reactors, July 1957-March 1958, (Senior Engineer).

4. Detroit Arsenal – Ordnance [sic] Tank Automotive Command, Internuclear Company. Development of concepts and means for the design of minimum-weight mobile shields, 1958, (Senior Engineer).

5. Atomics International Division, North American Aviation, Inc. – Internuclear Company. Assessment of radiation shielding in the Hallam (Nebraska) Nuclear Power Facility, 1959, (Senior Engineer).

6. Allison Division, General Motors Corporation – Internuclear Co., Review of the nuclear and engineering feasibility of a confidential propulsion system, 1959, (Project Manager).

7. U.S. Atomic Energy Commission, AT(11-1)-688, Internuclear Co., Experimental and analytical study of reflector controls for a large flux-trap test reactor, 1959, (Project Manager).

8. U.S. Atomic Energy Commission, AT(11-1)-800, Atomic Power Development Associates, Inc.,

Development of the criteria by which the AEC might develop fast reactors in the succeeding decade, 1959, (Senior Engineer).

9. U.S. Department of Commerce, Bureau of Mines – Internuclear Co., Design of an irradiation facility, 1960, (Project Manager).

10. U.S. Atomic Energy Commission – Gibbs & Hill, Inc. – Internuclear Co., Development of specifications, selection of sites and contractor, and reactor hazards analysis for the Genoa, Wisconsin plant of Dairyland Power Cooperative, 1960 (Project Manager).

11. University of Missouri – Internuclear Co., Development of the concept, design and appropriate safeguards for a major university reactor, 1960, (Senior Engineer).

12. Washington University – Mathematical and experimental study of convective heat transfer in arrays of porous material, 1961-1962, (Principal Investigator).

13. Ford Motor Company – Product and Systems Research Offices. Development of improved engineering methods; consultation in mechanics and applied mathematics. 1962-1966 (Principal Research Engineer).

14. Ford Motor Company – Automotive Safety Research Office, Direction of test, analytical, and concept efforts to increase the level of automobile occupant protection, 1966-1968, (Departmental Manager).

15. Burroughs Corporation, Development of printer and document sorters, 1969-1976, (Design Consultant).

16. Burroughs Corporation, Development of tolerances to manufacture an air-bearing mass memory, 1974, (Design Consultant).

17. U.S. Department of Defense (DARPA), Technology Assessment of Advanced Propulsion Systems for Some Classes of Combat Vehicles, 1978, (Consultant).

18. Exxon Corporation, Development of a composite automotive coil spring, 1978, (Director).

19. The Budd Company, Development of ductile iron hubs and reinforced plastic wheels and leaf springs for heavy trucks, 1979-1982, (Chief Engineer).

20. U.S. Army Tank Automotive Command, Research to extend the fatigue-life of M1 tank components, 1984-1985, (Contractor).

TECHNICAL LECTURES

1. "An Advanced Engineering Test Reactor," at the annual meeting of the American Nuclear Society, Los Angeles, June 1958, (by invitation).

2. "Radiation Shielding," at the Symposium sponsored by the Watertown Arsenal, U.S. Army, September, 1958, (by invitation).

3. "Analysis of SSPWR Hazards," before the Advisory Committee for Reactor Safeguards, U.S. Atomic Energy Commission, in Jamestown, New York, October 1960.

4. "Impact Dynamics," Safety and Human Factors Course, Technical Education Program, Ford Motor Company, June 1967.

5. "Side Impact Design," Automotive Safety Research Office presentation, Ford Motor Company, April 1968.

6. Turbine Engine Orientation, ten lectures for the Main Battle Tank Project, U.S. Army Tank Automotive Command, Warren, Michigan. June-August, 1969.

7. "Finite-Element Analysis of Structures," Engineering Seminar at Oakland University, November 1968.

8. "Propulsion-Pollution, or a Hero (Engine) for Our Time," Engineering Seminar at Oakland University, November 20, 1969.

9. "A Better Pollution Strategy," Keynote Lecture for Environmental Teach-In at Oakland University, May 1970. (This lecture was repeated at the request of several civic groups.)

10. "New Developments in RFI Suppression," at the annual meeting of the Society of Automotive Engineers, 1974.

11. "New Product Status," The Budd Company, 1979-1982.

12. "Disc or Spoke Wheels," The Budd Company, 1981.

OTHER ACTIVITIES

1952-1964 *Director,* Aircraft Parts Manufacturing Company

1958 *Licensed private pilot*

1960-1961 *Consultant,* Gibbs & Hill, New York, New York

1960-1969	*Director,* Contemporary Development, Inc. and Capital Development, Inc., Terre Haute, Indiana
1964	*Lecturer,* University of Michigan, Dearborn, Michigan
1966-1967	*Vice President,* Industrial Mathematics Society
1967-1968	*Lecturer,* Vehicle Safety and Human Factors Course, Ford Motor Company
1969-1976	*Design Consultant,* Burroughs Corporation, Detroit, Michigan
1969	*Consultant,* U.S. Army Tank Automotive Command, Warren, Michigan
1970	*Participant,* NSF Continuum Mechanics Workshop, Virginia Polytechnic Institute, Blacksburg, Virginia
1970-1992	*Referee,* Transactions of the Society of Automotive Engineers
1971	*Consultant,* All-American Engineering Company, Wilmington, Delaware
1972-1976	*Consultant,* Pyrohm, Incorporated, Detroit, Michigan and Antares Engineering, Incorporated, Troy, Michigan
1972-1984	*Trustee,* Village of Franklin, Michigan
1972	*Participant,* American Federation of Information Processing Systems Workshop, Cozumel, Mexico
1973-1976	*Consultant,* Max Diner, Durban, South Africa; Detroit Automotive, Warren, Michigan
1973-1980	*Consultant,* Department of Defense, U.S. Government

1973 *Participant,* Champion Ignition Conference, Mexico City

1974 *Consultant,* Ex-Cell-O Corporation, Walled Lake, Michigan; ASPRO, Inc., New York, New York; J-Tech Associates, Cedar Rapids, Iowa

1975 *Consultant,* White Consolidated Corporation, Atlas Van Lines, American Standards Testing Bureau, Prestolite Corporation, United Technologies, Inc.

1976 *Consultant,* Fruehauf Corporation, Detroit, Michigan

1983 *Consultant,* Hertz-Penske, R & R Carting, Welch Trucking, Otis Ford, SuperMover Van Lines, Dart Container, and Global Transport.

1984 *Consultant,* Great Bay Disposal, Christian Memorial Cultural Center, Baltimore & Ohio Railroad, and Hall Industries.

1985 *Consultant,* The Budd Company, Parker Hannifin, Structural Dynamics Research Corporation, Eastern Telecom, and Liquid Carbonic and Hall Industries.

1986 *Consultant,* NMB Automotive, Parker Hannifin, Agency Rent-A-Car, Chattanooga Rapid Transit Authority, State of Nevada, Detroit Testing Laboratory, Cooper Industries, Structural Dynamics Research Corporation, Osaka Motor Wheel, Hall Industries, Galtaco Incorporated, and Noetics Technologies.

Participants, AFS Conference on Austenitic Ductile Iron, Ann Arbor; P-Version Finite Element Analysis, St. Louis, Missouri IFR Aviation Seminar, Lansing, Michigan

1987 *Consultant,* Freightliner Corporation, Southeastern Michigan Council of Governments, Navistar International, Chattanooga Area Rapid Transit Authority, Structural Dynamics Research Corporation, Jet-Broom Associates, Orschein Manufacturing Company, NDC Bearings, PBM Industries, NMB Automotive, Tasa Corporation, Hall Industries, American Fleet Maintenance, Incorporated and American Made Incorporated.

Participant, International Standards Organization; SPI Advanced Composites Exposition; Standards and Truck & Bus Chassis Committee, Society of Automotive Engineers.

1988 *Consultant,* Super Modern Laundry, Macomb County Sheriff, O & W Distributing, Structural Dynamics Research Corporation, PBM Industries, Freightliner Corporation, Orschein Manufacturing Company, Hall Industries, Lees Enterprises.

Participant, ABC-TV 20/20 Program (Seatbelts) on 7/22; Restraint Systems Seminar, Atlanta, Georgia; Wheel and Truck & Bus Chassis Committees, Society of Automotive Engineers.

1989 *Consultant,* Counties of Genessee, Midland, and Oakland (MI), Hall Industries, NMB Automotive, Adjusting Services Unlimited, Draw-Tite Incorporated, The Blunt Company, SEMCOG, EG&G-Structural Kinematics Incorporated, Nissan Motor Company, General Electric, O & W Distributing, Architectural Polymer Technologies Incorporated, United Parcel Service, General Motors – Inland Division, J. C. Penney, Continental Transportation Corporation, Flannery Ford,

David Freedman Incorporated, and West Agricultural Chemicals.

Participant, Technical Advisor, International Standards Organization Meeting (SC-19) in London, England, Wheel and Truck & Bus Chassis Committees, Society of Automotive Engineers.

1990 *Consultant,* J. I. Case Company, Four Seasons Travel, Architectural Polymer Technologies Incorporated, Draw-Tite Incorporated, The Blunt Company, O & W Distributing, Blue Bird Coach, Beam's Industries Incorporated, Jon Greca, Lakeside Mall, Gro-Control Incorporated, Nissan Motor Company, and LGM Limited.

Participant, Wheel Standards and Truck & Bus Chassis Committees, Society of Automotive Engineers; Invited Speaker, China National Automotive Engineering Society; REI Incorporated Caucasus Trek, USSR; President, Industrial Mathematics Society.

1991 *Consultant,* Auto Bolt & Nut Company, Inc., Indian River Transport, Inc., Mitsubishi Motor Company, Gro-Control Incorporated; Automated Filing Systems; U. S. Department of Defense; Moog Corporation; American Van Incorporated; Brinks, Incorporated; Shippers, Incorporated; G.A.B. Business Services, Inc.; Krzyzaniak Trucking, Inc.; Central Transport, Incorporated; Western American Corporation; Dix Auto Recyclers, Incorporated.

Participant, Wheel Standards and Truck & Bus Chassis Committees, Society of Automotive Engineers; Juror, Michigan 46th District Court; President, Industrial Mathematics

Society; Contributor, Encyclopedia of Careers and Vocational Guidance.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 37 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> (b)(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision(a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> > (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> >
> > (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
> >
> > (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
> >
> > (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any

> orders except an order to submit to a physical or mental examination;
>
> (E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(b)(2).

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

. . .

> (c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

. . .

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained

or depositions to be taken or discovery to be had or may make such other order as is just.

. . .

Fed. R. Civ. P. 56(c), (f).

Supreme Court, U.S.
FILED
DEC 27 1996
CLERK

No. 96-803

In The

Supreme Court of the United States

October Term, 1996

STEVEN D. SITKOFF and BERNICE E. SITKOFF, Individually and as Parents and Natural Guardians of Jessica Sitkoff, a Minor, and as Administrators of the Estate of Gwyn Allison Sitkoff, Deceased,

Petitioners,

vs.

BMW OF NORTH AMERICA, INC. and BAVARIAN MOTOR WORKS, A.G.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM F. KINIRY, JR.
Counsel of Record
O. DANIEL ANSA
PIPER & MARBURY L.L.P.
Attorneys for Respondents BMW of North America, Inc. and Bayerische Motoren Werke Aktiengesellschaft
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70228 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

35 pp

QUESTION PRESENTED

Whether this Court should grant certiorari in this state product liability "crashworthiness" case for the purpose of addressing the administration of summary judgment under Rule 56 of the Federal Rules of Civil Procedure, where the district court was required to dismiss Petitioners' claims pursuant to Rule 56 and find for the Respondents as a matter of law after an on the record review of the merits of Petitioners' case, where Petitioners were afforded adequate review at the circuit court level, and where action by this Court cannot provide any meaningful relief to Petitioners?[1]

---

1. Note: Respondents do not agree with the third "Question Presented For Review" inasmuch as that question is an improper attempt to characterize the grant of summary judgment as a "sanction" as opposed to a reasoned analysis of the record submitted by the parties and the law.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Bayerische Motoren Werke Aktiengesellschaft is a German corporation. It has no United States parent or nonwholly owned subsidiary corporations. It has numerous wholly owned subsidiary corporations including BMW of North America, Inc. BMW of North America, Inc. is a corporation organized under the laws of Delaware. It has no nonwholly owned subsidiary corporations. The caption of the case does not list all parties in the proceeding below. The names of all parties are listed in the Third Circuit's caption to its opinion, appearing in Petitioner's Appendix at 4a. *See also Sikoff v. BMW of North America, Inc. v. Estate of Schreiber*, [illegible] 1172 (3d Cir. 1996).

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APPENDIX

Appendix A — United States District Court for the Eastern District of Pennsylvania, Local Rule of Civil Procedure 20 ..... 1a

BMW of North America, Inc. and Bayerische Motoren Werke Aktiengesellschaft (hereinafter referred to jointly as "Respondents" or "BMW NA" and "BMW AG" respectively), respectfully request that this Court deny the Petition of Steven D. Sitkoff and Bernice E. Sitkoff, Individually and as Parents and Natural Guardians of Jessica Sitkoff, A Minor, and as Administrators of the Estate of Gwyn Allison Sitkoff, Deceased ("Petitioners") for review of the action of the United States Courts of Appeals for the Third Circuit.

RULES INVOLVED

In addition to the rules cited by Petitioners, *see also* United States District Court for the Eastern District of Pennsylvania, Local Rule of Civil Procedure 20, which appears in the appendix to this brief in opposition. (Resp. App., 1a).

COUNTERSTATEMENT OF THE CASE

The Petition contains various omissions, misstatements and errors concerning the underlying facts and procedural history of this "crashworthiness" case brought pursuant to substantive product liability legal theories under Pennsylvania state law and Federal Rules of Civil Procedure. In particular, Respondents do not agree that Petitioners' statement of the case (Petition at 2-6) or analysis of the factual basis for the Third Circuit's affirmation of the district court's order granting summary judgment (Petition at 8-17) presents a fair review of the record. Contrary to Petitioners' suggestion, this case does not present an important question in the administration of summary judgment motions under Rule 56 nor does it involve dispositive discovery sanctions. What follows is an outline of the underlying factual issues designed to put the case in perspective and to comply with Supreme Court Rule 15.2.

Petitioners filed a complaint against Respondents in the United States District Court for the Eastern District of Pennsylvania on July 15, 1993, seeking recovery for alleged enhanced injuries to their decedent and surviving minor resultant from a construction related highway accident wherein a motor vehicle in which these persons were riding was caused to crash through a guard rail, go airborne, strike a large unyielding tree, descend an embankment and flip upside down. Petitioners alleged that the Respondents were the sellers, distributors and/or manufacturers of the 1988 BMW 325i convertible and liable to Petitioners for the damages they sustained as a result of that vehicle's lack of crashworthiness pursuant to legal theories of strict liability, negligence, breach of warranty and punitive damages.

Such a claim for enhanced injuries is commonly known as a "crashworthiness claim." In order to make out such a claim under Pennsylvania law, the Petitioners were required to prove: (1) that the design of the automobile was defective and that when the design was made, an alternative, safer design practicable under the circumstances existed; (2) what injuries, if any, would have resulted to the Petitioners' surviving minor and decedent had the alternative, safer design, in fact been used; and (3) some method of establishing the extent of enhanced injuries to Petitioners' surviving minor and decedent attributable to the defective design.

On September 9, 1993, BMW NA served Petitioners with written discovery requesting, *inter alia*, the identity and reports of the expert witnesses Petitioners proposed to call to testify at trial. Nine months later, on June 24, 1994, Petitioners identified two automotive engineers as being experts expected to be used at trial, but failed to set forth the substance of their opinions or the basis for their testimony with any meaningful detail. Specifically, Petitioners stated that "[Petitioners] have not yet

conclusively determined the experts they will call at trial and will supplement their answer as this decision is made. At present, [Petitioners] intend to call Peter C. Bertelson, D.Sc. and Andrew N. Gilberg to testify on the subjects of occupant protection, crashworthiness, roll bar design, and the suitability and practicality of installing a roll bar in the vehicle ." (App. 53a). Petitioners never produced expert reports from these potential expert witnesses. Moreover, Petitioners did not identify an accident reconstructionist, a medical expert or a bio-mechanical expert who would provide testimony on the dynamics of the happening of this accident, the nature and extent of injuries, the nature and extent of so called "enhanced" injuries or to what extent the alleged "enhanced" injuries sustained by both Petitioners' surviving minor and decedent were attributable to the alleged defective design.

As stated in the Petition (Petition at 2), Petitioners served two sets of discovery requests asking for information about the design, manufacturing and testing of the 1988 BMW 325i convertible. On September 20, 1993, BMW NA responded to the first discovery requests and informed Petitioners, *inter alia,* that it did not design or manufacture the 1988 BMW 325i convertible. Moreover, in addition to its answers and objections to individual discovery requests, BMW NA set forth, in writing, its specific definitional and grammatical problems with certain of Petitioners' discovery requests which rendered many of these requests exceedingly overbroad, unintelligible, or both. BMW AG was not served with process until October 8, 1993 and did not file its answer until November 9, 1993. BMW AG was never served with Petitioners' first set of discovery requests.

On December 1, 1993, Petitioners served both Respondents with a second set of discovery requests asking for virtually the same information contained in their first set of discovery requests. On July 1, 1994, Petitioners filed a motion to compel

both BMW NA and BMW AG to respond to both their first and second set of discovery requests.

On July 18, 1994, BMW NA filed its response to Petitioners' discovery motion pointing out for the second time the specific definitional and grammatical problems existent within Petitioners' first set of discovery requests that rendered them unintelligible and impossible to answer. Also on July 18, 1994, BMW NA served its response to Petitioners' second set of discovery requests in which it again stated that it did not design or manufacture automobiles.

On July 18, 1994, BMW AG filed its response to Petitioners' discovery motion pointing out that BMW AG did not answer Petitioners' first set of discovery because those discovery requests had never been served upon BMW AG and had been issued at a time prior to BMW AG being served with original process. Contrary to Petitioners' assertion that "BMW AG failed to respond to either set of discovery requests" (Petition at 3), on July 18, 1994, BMW AG responded to Petitioners' second set of discovery requests and identified crash films, test reports, design drawings, approximately 220 photographic slides, 16 still photographs and video reproductions of vehicular rollover tests, and various documents relative to the BMW 325i and offered the same for inspection by Petitioners. (R. 507-516). *At no time during the course of this litigation have Petitioners or their expert witnesses ever asked to inspect these crash films and various documents.*

On October 20, 1994, the district court held a discovery conference concerning Petitioners' motion to compel discovery responses. During the conference, counsel for Respondents identified for the third time those specific definitional and grammatical problems existent within Petitioners' first set of discovery requests that rendered them exceedingly overbroad

and unintelligible. The district court ordered the parties to meet and work out their discovery difficulties. On October 24, 1994, the district court issued a Scheduling Order requiring Petitioners to serve expert reports on Respondents by January 13, 1995. (R. 801-805).

On October 25, 1994, counsel for the parties had their first face-to-face discovery conference. During this conference, Respondents' counsel pointed out for the fourth time those specific definitional and grammatical problems existent within Petitioners' discovery requests that rendered them exceedingly overbroad, unintelligible, or both. As a result of the conference, Petitioners agreed to investigate modification of certain discovery requests and Respondents agreed to provide responses to those discovery requests once modified to mutual satisfaction and understanding. Petitioners never provided modified discovery requests nor did Petitioners inspect those discovery documents concerning the design, manufacture and testing of the subject vehicle identified by BMW AG on July 18, 1994.

Petitioners did not submit expert reports by the January 13, 1995, deadline established by the October 24, 1994 Scheduling Order. Rather, on January 13, 1995, Petitioners filed their first non-compliant motion for extension to serve expert reports. In that motion, Petitioners claimed that they were unable to timely submit expert reports because: (1) Respondents failed to serve unspecified discovery responses intended to form the basis for the opinions of their experts; (2) Respondents intended to conduct a number of depositions; and (3) Petitioners' counsel's trial schedule prevented compliance with the Scheduling Order. (App. 807-809). Petitioners persisted in representing to the court that their automotive engineering experts could not prepare expert reports without unspecified discovery from Respondents despite Petitioners' affirmative decision not to inspect the crash films, test reports and various documents made available by BMW AG

at its counsel's office. In addition, despite the allegations set forth in Petitioners' complaint and the well established elements necessary to proffer and sustain a crashworthiness claim, Petitioners did not address in their motion their failure to identify an accident reconstructionist, a medical expert or a bio-mechanical expert who would provide testimony on the dynamics of this accident, the nature and extent of injuries, the nature and extent of "enhanced" injuries or how the "enhanced injuries" sustained by the Petitioners' decedent and surviving minor were attributable to the alleged defective design of the automobile. Moreover, Petitioners had no excuse for such omission inasmuch as they had exclusive possession of the subject automobile for over four years and complete control over the medical and damages aspects of this case.[2]

Contrary to Petitioners' assertions that Respondents opposed the motion for extension (Petition at 3), despite the incredulous reasons stated by Petitioners in support of their first motion for extension and Petitioners' failure to comply with the district court's Scheduling Order, Respondents agreed not to oppose Petitioners' motion and not to pursue sanctions under Fed. R. Civ. P. 37(g) to which Respondents were entitled under the Scheduling Order. (R. 820-823). As a result, the district court

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2. For example: Petitioners' decedent was interred without autopsy. In investigating the nature and extent of the particular injuries suffered by the decedent, Respondents' counsel attempted to speak with Mr. Ron Dellavechia, Petitioners' mortician. Mr. Dellavechia refused to speak with Respondents' counsel without the prior permission of the Petitioners. Respondents' counsel brought this issue to the attention of Petitioners' counsel who initially agreed to permit Mr. Dellavechia to be interviewed, then withdrew that permission, then stated that "the Sitkoff family didn't want this done during the holiday season," then agreed to permit the interview at some unspecified future time which never occurred all of which control exercised by Petitioners and their counsel resulted in the defense being forced to issue and serve a subpoena to compel his testimony.

entered an order granting Petitioners' motion for extension to serve expert reports and reiterated its procedural requirements for filing motions to extend deadlines. The district court also issued a new Scheduling Order dated February 24, 1995, establishing May 1, 1995 as the new deadline for submission of Petitioners' expert reports. (R. 830-834).

On February 20, 1995, at the insistence of Respondents, counsel for the parties conducted their second face-to-face discovery conference. During this conference, Respondents' counsel pointed out for the fifth time those specific definitional and grammatical problems existent within Petitioners' discovery requests that rendered them exceedingly overbroad, unintelligible, or both. Again, Petitioners agreed to investigate modification of certain discovery requests and Respondents agreed to provide responses to those discovery requests once modified to mutual satisfaction and understanding. Moreover, despite Petitioners' counsel's physical presence at the offices of Respondents' counsel, no request was made to review the crash films, test reports or other discovery documents identified by BMW AG on July 18, 1994, in response to Petitioners' second set of discovery requests.

On March 10, 1995, counsel for Respondents wrote a letter to Petitioners' counsel in an effort to advance discovery. Petitioners were once again invited to review films, color slides and contact sheets regarding vehicle tests identified in BMW AG's July 18, 1994 discovery responses. Also an inquiry was made regarding Petitioners' agreement to provide discovery definitions. (R. 1406). Petitioners did not acknowledge or respond to the letter, provide modified discovery requests or inspect those discovery documents identified by BMW AG on July 18, 1994, concerning the design, manufacture and testing of the BMW 325i.

Petitioners did not submit expert reports by the May 1, 1995, deadline established by the February 24, 1995 Scheduling Order. Rather, on May 1, 1995, Petitioners filed their second non-compliant motion for extension to serve expert reports. (R. 881-883). Petitioners stated reasons for their second non-compliant motion included Respondents' alleged refusal to comply with unspecified discovery requests as well as the need of their consultants to review the testimony of certain witnesses scheduled to be deposed by the Respondents. These witnesses were the Petitioners themselves, their surviving daughter and their mortician. Petitioners continued to represent to the district court that their automotive engineering experts could not prepare expert reports without (unspecified) discovery from Respondents despite Petitioners' affirmative decision not to inspect the crash films, test reports and various documents made available for inspection by BMW AG at its counsel's office. Once again, Petitioners also failed to identify an accident reconstructionist, a medical expert or a bio-mechanical expert or issue reports regarding the dynamics of this accident, the nature and extent of injuries, the nature and extent of "enhanced" injuries or to what extent the "enhanced" injuries allegedly sustained by the Petitioners' decedent and surviving minor were attributable to the alleged defective design of the vehicle, all of which are essential elements in a crashworthiness claim.

On May 8, 1995, Respondents filed a motion for summary judgment alleging, *inter alia*, that Petitioners' failure to identify necessary experts and produce expert reports in accordance with the court's established deadline precluded them from introducing expert testimony at trial, without which Petitioners could not sustain their crashworthiness claim. (R. 888-905). Based upon the record there were no genuine issues of material fact concerning the essential elements of the crashworthiness claim because Petitioners were unable to show whether the subject automobile was defectively designed; whether either Petitioners'

surviving minor or decedent had sustained "enhanced" injuries and the nature of the same; and whether the alleged defects or the alleged negligence of the Respondents was a substantial factor in causing the alleged "enhanced" injuries sustained by Petitioners' surviving minor or decedent.

Additionally, Respondents timely filed a memorandum opposing Petitioners' second non-compliant motion for extension to serve expert reports. (R. 948-953). This memorandum identified Petitioners' failure to show good cause for their inability to comply with the February 24, 1995 Scheduling Order. For over ten months, BMW AG had made available to Petitioners the information they asked for in their second discovery requests, such as various crash test films, photographs, slides and other documents, and not once during that period of time did Petitioners ever ask to review the same. In addition, Petitioners claimed that they needed to conduct additional discovery consisting of the depositions of mortician, a witness under the control of Petitioners, and the depositions of Petitioners themselves. Moreover, Petitioners failed to identify an accident reconstructionist, a medical expert or a bio-mechanical expert who would provide testimony on the dynamics of this accident, the nature and extent of injuries, the nature and extent of "enhanced" injuries or to what extent the "enhanced" injuries of the Petitioners' decedent and surviving minor were attributable to the alleged defective design of the vehicle, the submission of which were not dependent upon any discovery from the Respondents.

Although on May 31, 1995, Petitioners filed a document entitled Memorandum of Law in Opposition to Motion for Summary Judgment and Cross-Motion for Ruling on Outstanding Motions, they did not respond to the well pleaded allegations contained in Respondents' motion for summary judgment as required by Local Rule of Civil Procedure 20. (R.

971-980). Furthermore, Petitioners made no effort to offer any additional evidence of record which would establish the existence of each element of their crashworthiness claim. In neglecting to contest Respondents' allegations or provide additional evidence, Petitioners failed to establish on the record any issue of fact with respect to the essential elements of their claim.

Petitioners opposed the Rule 56 motion by asserting that Respondents were not forthcoming with the discovery responses necessary for the preparation of their automotive engineering expert reports and stated their alleged need to depose the decedent's mortician and Petitioners themselves. However, no affidavits were issued in support of their opposition memorandum of law, and no effort was made to constructively meet the technical requirements of Rule 56(f) by identifying with specificity what particular information was necessary from the Respondents and how, if the discovery was uncovered, it would preclude summary judgment.

By Order and Memorandum issued on July 14, 1995, the district court in first concluding that Petitioners failed to sufficiently oppose Respondents' Rule 56 motion, granted summary judgment, denied Petitioners' Motion for Enlargement of Time in Which to Serve Expert Reports, and denied Petitioners' Cross-Motion for ruling on Outstanding Discovery Motions. (App. 11a-32a). After reviewing the summary judgment record, the court ruled that "[Petitioners could not] establish a genuine issue of material fact regarding the injuries, if any, that would have resulted if a safer alternative design had been utilized in the accident vehicle rather than the allegedly defective design. Because [Petitioners could not] produce evidence to support each element of their claims, [Respondents were] entitled to judgment as a matter of law." (App. 32a).

On July 28, 1995, Petitioners' filed a motion for reconsideration of the July 14, 1995 Order, attaching for the first time affidavits from three automotive engineering experts. (App. 6a). Petitioners did not serve affidavits from an accident reconstructionist, a medical expert or a bio-mechanical expert witness. (App. 9a). On August 11, 1995, Respondents opposed Petitioners' motion for reconsideration. In opposing the motion for reconsideration, Respondents contended that the purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. A motion for reconsideration is not a forum to relitigate the subject of the motion for summary judgment or to present evidence that is not newly discovered or available to the party before judgment was rendered on the summary judgment motion.

On November 22, 1995, the district court denied Petitioners' motion for reconsideration and ruled, *inter alia*, that "[Petitioners' failed] to demonstrate by means of at least preliminary expert reports or affidavits that the alleged defects in the accident vehicle caused or enhanced the injuries suffered by Gwyn and Jessica Sitkoff in the accident. Even the belated submission of affidavits which purport[ed] to support a Rule 56(f) motion fail[ed] to address the last, and most important issue. Consequently, there is no basis for reconsidering this [c]ourt's decision to grant [Respondents'] motion for summary judgment." (App. 10a).

Petitioners appealed the district court's grant of summary judgment to the Third Circuit Court of Appeals. On July 25, 1996, after reviewing the extensive record and briefs submitted by the parties and upon hearing oral argument, the Third Circuit affirmed, without dissent, the summary judgment order entered by the district court. (App. 3a). The Petitioners filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied by the Third Circuit on August 22, 1996. (App. 1a). The

Petitioners filed this petition for writ of certiorari on November 20, 1996, which was placed on the docket on November 22, 1996.

REASONS FOR DENYING THE WRIT

Review on a writ of certiorari is not a matter of right, but of judicial discretion. The writ will be granted only "for compelling reasons." The Petitioners have failed to set forth any "compelling" reasons why this Court should grant the writ, other than Petitioners' dissatisfaction with the result below. Petitioners' argument centers around Petitioners' belief that the Third Circuit misapplied Rule 56 as well as its own mandatory six part test relating to dispositive discovery sanctions. Even if their belief is correct, which it is not, there are insufficient grounds for review, where the Third Circuit's decisions have all been unanimous, and no judge of the circuit considered the case worthy of *en banc* hearing. Moreover, Supreme Court Rule 10 clearly states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the *misapplication of a properly stated rule of law*." (emphasis added).

I.

THE DISTRICT COURT PROPERLY GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE PETITIONERS FAILED TO PRODUCE ANY EVIDENCE CREATING A FACT ISSUE ON ALL THREE ESSENTIAL ELEMENTS OF THEIR CRASHWORTHINESS CLAIM AND, ALTERNATIVELY, FAILED TO INVOKE THE PROTECTION OF RULE 56(f).

The granting of summary judgment for Respondents and the dismissal of Petitioners' claims by the district court was

based on the Petitioners' failure to meet its substantive burden under Rule 56 as established by this Court and, furthermore, on Petitioners' failure to invoke the procedural protection of Rule 56(f) even under the most liberal standard adopted by the Third Circuit. The substantive application of Rule 56 is one that has been addressed repeatedly by this Court and strictly followed by the district and circuit courts. Moreover, although the circuit courts have varied in their applications of the procedural protections provided by Rule 56(f), the Petitioners' case was reviewed below pursuant to the more generous standard thus affording them the greatest opportunity for a finding in their favor. A finding by this Court that one interpretation of Rule 56(f) is more favorable than another would have no impact on the outcome of this case. As such, this case affords no opportunity to this Court to address a compelling legal issue or a conflict among the circuits concerning the application of Rule 56. To the contrary, it provides this Court only with an opportunity to decide whether Judge Troutman of the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit misapplied a properly stated rule of law. Pursuant to Supreme Court Rule 10, such an assertion is insufficient to warrant the granting of a writ for certiorari.

A. Petitioners failed to create any genuine issue of material fact.

This Court has determined that Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon a properly supported motion, when the non-moving party fails to make a showing of "any *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis by this Court); *see also Celotex v. Catrett*, 477 U.S. 317, 324 (1986). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law

will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Moreover, the evidence offered by the non-moving party must establish a genuine issue such that the "jury could reasonably find for the plaintiff." *Id.* at 252. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Id.*

In this case, Petitioners asserted that the subject automobile was defective because it was not sufficiently "crashworthy." Under the "crashworthiness" doctrine, a seller of a defective product is liable in situations "in which the defect did not cause the accident, but rather increased the severity of the injury over that which would have occurred" absent the defect. *See, e.g., Mills v. Ford Motor Co.*, 142 F.R.D. 271, 272 (M.D. Pa. 1990). In order to establish such a claim under Pennsylvania law, Petitioners were required to prove the following: (1) that the design of the vehicle was defective and that when the design was made, an alternative, safer design practicable under the circumstance existed; (2) what injuries, if any, would have resulted to the Petitioners' decedent and surviving minor had the alternative, safer design, in fact, been used; and (3) some method of establishing the extent of Petitioners' decedent and surviving minor's enhanced injuries attributable to the alleged defective design. *Kupetz v. Deere & Co.*, 435 Pa. Super. 16, 644 A.2d 1213, 1219 (1994).

It is well settled under Pennsylvania law that the Petitioners cannot prove that a complex product was defectively designed without the aid of expert testimony. *Harkins v. Calumet Realty Co.*, 418 Pa. Super. 405, 614 A.2d 699, 707 (1992); *Tennis v. Fedorwicz*, 140 Pa. Commw. 7, 592 A.2d 116, 117 (1991). Similarly, expert testimony is required where the issues in the overall case are complex and require scientific or specialized knowledge or experience in order to be properly understood. *Dion v. Graduate Hosp.*, 360 Pa. Super. 416, 520 A.2d 876, 881

(1987). The proper design of an automobile and any enhanced injury attributable to the design of that automobile, involved in a horrific and complicated collision such as the one at bar, is unquestionably a subject requiring the use of multiple layers of expert testimony. Thus, without the aid of expert testimony, Petitioners could not prove that at the time of this accident, an alternative, safer design practicable under the circumstances existed; the injuries that would have resulted had the alternative safer design been used; or the extent of the "enhanced" injuries attributable to the alleged defective design.

Respondents' filed a properly supported Rule 56 motion for summary judgment, containing concise statements of fact and alleging, *inter alia,* that by failing to identify or produce reports from an automotive engineer, an accident reconstructionist, a medical expert, a bio-mechanical expert, or other witnesses possessing scientific or specialized knowledge and experience there were no genuine issues of material fact concerning the essential elements of their crashworthiness claim and that Respondents were entitled to judgment as a matter of law. (R. 888-905). Pursuant to Rule 56(e) and this Court's ruling in *Celotex*, Petitioners were obligated to set forth facts showing that there were genuine issues of material fact for trial and that the moving party was not entitled to judgment as a matter of law.

In response, the Petitioners filed a Memorandum of Law in Opposition to Motion for Summary Judgment and Cross-Motion for Ruling on Outstanding Discovery Motions.[3] (R. 971-980). Petitioners' response did not refute the factual allegations contained in the Rule 56 motion as required by E.D.

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3. In their memorandum, they argued that summary judgment was inappropriate because their automotive engineering experts required: (1) the depositions of the [Petitioners] themselves; (2) the deposition of the mortician; and (3) certain undisclosed discovery responses from [Respondents].

Pa. R. Civ. P. 20,[4] was not supported by affidavits and failed to show that a genuine issue of material fact did exist with respect to the elements of their claim, including those essential elements concerned with the "enhanced" injuries attributable to the alleged defective design of the automobile. Petitioners' failure to create a factual issue on the "enhanced" injuries, a material element of their claim, necessarily rendered all other facts immaterial, leaving the district court no alternative but to grant the Rule 56 motion.[5]

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4. Eastern District of Pennsylvania Rule of Civil Procedure 20(c), states in pertinent part:

> Unless the parties have agreed upon a different schedule and such agreement is set forth in the motion, or unless the courts directs otherwise, any party opposing a motion shall serve a brief in opposition, together with such answer or other response as may be appropriate, within ten (10) days after service of the motion and supporting brief. . . . In the absence of timely response, the motion may be treated as uncontested.

E.D. Pa. R. Civ. P. 20(c) (effective May 31, 1990 and superseded by E.D. Pa. R. Civ. P. 7(1)(c) effective July 1, 1995).

5. Petitioners contend that they provided interrogatory answers that satisfied their evidentiary burden of production. This statement is incorrect. Petitioners offered no evidence, in their interrogatories or otherwise, from which a jury could reasonably find for the Petitioners under the substantive law applicable to this product liability "crashworthiness" case.

B. Petitioners did not properly invoke Rule 56(f) protection even under the most liberal standard applied by the Third Circuit below.

Federal Rule of Civil Procedure 56(f) gives a district court the discretion to delay judgment on a motion for summary judgment while critical discovery is pending. (App. 77a). The circuit courts have varied somewhat in their interpretation and application of Rule 56(f). Some circuits require that the party seeking the protection of 56(f) comply with the technical requirements of the Rule, including the submission of an affidavit setting forth the reasons for the delay.[6] Other circuits, including the Third Circuit below, have adopted a more liberal interpretation of Rule 56(f) and require only that the party seeking the protection of the Rule constructively meet the requirements of the Rule.[7]

An adoption of a liberal interpretation of Rule 56(f) does not mean, however, "that Rule 56(f) has no bite or that its prophylaxis extends to litigants who act lackadaisically . . . Rule 56(f) is designed to minister to the vigilant, not to those who slumber upon perceptible rights." *Resolution Trust Corp.*

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6. *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995); *Humphreys v. Roche Biomedical Laboratories, Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993); *Foster v. Arcata Assoc., Inc.*, 772 F.2d 1453, 1467 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986); *Guthrie v. Sawyer*, 970 F.2d 733, 738 (10th Cir. 1992).

7. *Resolution Trust Corp. v. North Bridge Assoc., Inc.*, 22 F.3d 1198, 1203-1208 (1st Cir. 1994); *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 918-919 (5th Cir. 1992); *Dean v. Barber*, 951 F.2d 1210, 1214 n. 3 (11th Cir. 1992); *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1314 (3d Cir. 1994) (citing *Lunderstadt v. Colafella*, 885 F.2d 66, 71 (3d Cir. 1989)).

v. North Bridge Assoc. Inc., 22 F.3d at 1203. Therefore, a party seeking the protection of Rule 56(f), even under the more generous standard, must meet a number of established benchmarks before the court will grant such protection. These benchmarks require that the party identify with specificity: (1) what particular information is sought; (2) why such information has not previously been obtained; and (3) how, if uncovered, the particular information would preclude summary judgment. *See St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1314 (3d Cir. 1994); *Resolution Trust*, 22 F.3d at 1203; *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 (5th Cir. 1992), *cert. denied*, 508 U.S. 910 (1993).

1. Petitioners failed to identify the information sought with specificity.

The district court noted that Petitioners failed to "identif[y] the information needed from [Respondents] in order to procure expert reports." (App. 26a). In fact, in their response, Petitioners made only the general assertion that "without the benefit of *the documents long ago requested* . . . [Petitioners] are unable to provide comprehensive expert reports . . . ." (R. 977) (emphasis added). It appears from these vague references that Petitioners expected the court to engage in an exercise of mind reading. The court could not assess the merits of Petitioners' opposition or be certain that Petitioners were attempting to delay summary judgment in good faith as it had no description whatsoever of the information that was sought.

Petitioners also alleged that in order for their automotive engineering experts to provide complete reports, they required the depositions of the Petitioners themselves and the deposition of the mortician. It is unlikely that Petitioners' automotive engineering experts were hampered in rendering opinions by the fact that the Respondents had not conducted the scheduled

depositions of Petitioners. Similarly, the mortician's deposition could not have been an impediment to Petitioners' experts when this witness was within the complete control of Petitioners. In fact, access to the mortician had been denied the Respondents by Petitioners despite a request of six months duration.

2. Petitioners failed to justify the delay in recovering the information.

Petitioners assert that "BMW AG failed to respond to either set of discovery requests . . ." (Petition at 3). This allegation is false, misleading and baseless. In fact, Petitioners' conceded in other documents filed with the district court that Respondents "have made certain materials available for inspection." (R. 882). Without ever having examined these discovery materials, Petitioners insisted that additional undefined alleged critical discovery was necessary.

The Respondents answered Petitioners' discovery requests that were intelligible and capable of being answered. The Respondents identified (1) in writing, (2) before the court, and (3) in two separate court ordered discovery conferences with counsel for Petitioners, those areas of Petitioners' discovery requests which required further definition before factual responses could be made. However, despite these efforts, counsel for Petitioners refused to provide this recognized necessary detail, reporting only that they would take the matter "under advisement." In addition, on July 18, 1994, in response to Petitioners' second set of discovery requests, BMW AG identified crash films, test reports, design drawings, approximately 220 photographic slides, 16 still photographs and video reproductions of vehicular rollover tests, and various documents relative to the BMW 325i and repeatedly offered the same for inspection by Petitioners. (R. 515-516). After reviewing the record, the district court below found that Petitioners failed to

provide any "explanation of how [Respondents' alleged] unresponsiveness to [Petitioners'] prior discovery request prevented Petitioners from offering expert evidence relating to their claims of injury." (App. 30a).

3. Petitioners failed to show how the discovery of the unspecified information would have precluded the entry of summary judgment.

Moreover, the Petitioners failed to show how the discovery of the unspecified information would have precluded the granting of summary judgment for Respondents as a matter of law. In fact, the district court analyzed this very issue in its Memorandum and Order granting summary judgment. The district court noted that "the [Petitioners] failed to articulate the precise reasons why additional discovery from [Respondents would] support substantive opposition to [Respondents'] motion for summary judgment." (App. 31a). Thus, even if Petitioners had obtained this unspecified information, it would not have affected the district court's decision to grant Respondents' motion for summary judgment.

At no time did the Petitioners identify an accident reconstructionist, a medical expert or a bio-mechanical expert, let alone allege that the Respondents did something to impede their ability to identify such experts or have such experts provide testimony regarding the dynamics of this accident or the "enhanced injury" elements of their crashworthiness claim. Because Petitioners' claims must necessarily be dismissed upon Petitioners' failure to raise an issue of fact with respect to *any* element necessary to their claims, even if the unspecified discovery of which Petitioners complain had been acquired, Petitioners' case would have been dismissed as a matter of law. (App. 32a).

Therefore, after reviewing the merits of the record submitted by both parties to the motion, the district court held that: (1) "although [Petitioners] have moved for an extension of time to produce expert opinion(s), they have not explained why expert medical evidence, at least, has not been obtained, have not demonstrated that some aspect of past discovery prevented them from obtaining expert evidence and have not established that further discovery will permit them to obtain the necessary expert evidence . . . [and] . . . have not shown the good cause necessary for an enlargement of time to conduct discovery" (App. 31a); (2) "[w]ith respect to [Respondents'] motion for summary judgment, [Petitioners] concede, and the [c]ourt concludes, that expert testimony is necessary in this action to establish a defect which caused enhanced injuries as well as to establish the enhanced injuries suffered because of the alleged defective design. [Petitioners] have not, however, produced any expert evidence in support of their claim. Without expert testimony, and, indeed, without any affidavit or other evidence offered in opposition to [Respondents'] motion for summary judgment, there is no evidence of record to support [Petitioners'] crashworthiness claim" (App. 31a); (3) "[f]inally, the [Petitioners] have failed to properly oppose summary judgment based upon the need for further discovery by submitting a motion and affidavit in accordance with Rule 56(f), and have failed to articulate the precise reasons why additional discovery from [Respondents] will support substantive opposition to [Respondents'] motion for summary judgment. Hence, [Petitioners'] cross-motion for ruling on outstanding discovery motions will be denied." (App. 31a-32a).

In order to survive Respondents' Rule 56 motion for summary judgment Petitioners were required, as a matter of law, to file a response which either established a genuine issue of material fact for all three essential elements of their crashworthiness claim or invoke the protection of Rule 56(f).

Petitioners did neither. After a meritorious review of the record submitted by the parties in accordance with the summary judgment standard espoused by this Court, the district court properly concluded that it was required as a matter of law to grant summary judgment for Respondents.

II.

GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS AFTER AN ON THE MERITS EXAMINATION PURSUANT TO RULE 56 WAS NOT THE EQUIVALENT OF A DISMISSAL FOR DISCOVERY SANCTION.

This case does not present the Court with an opportunity to address Rule 37 discovery sanctions that have peremptory effect because Petitioners' complaint was not dismissed as a discovery sanction. Rather, Petitioners' claims were dismissed pursuant to Respondents' Rule 56 summary judgment motion and Petitioners' response to the same, and only after the district court made a substantive, on the merits determination that Petitioners failed to show the existence of any genuine issue of material facts and therefore could not sustain the essential elements of their crashworthiness claim. Under the standards set forth by this Court in *Celotex*, the district court was required as a matter of law to grant summary judgment for Respondents.

Petitioners are obviously dissatisfied with the Third Circuit's affirmation of the district court's granting of summary judgment for Respondents. Their Petition is nothing more than a third effort to salvage their claims which were unsupported by the facts of this case. Instead of presenting a fair review of the record to this Court, Petitioners are improperly attempting to characterize the grant of summary judgment as a "sanction" as opposed to a reasoned analysis of the record submitted by the

parties and the law and would have this Court believe that they were deprived of their day in court without the opportunity for meaningful review.

Petitioners suggest that the Third Circuit and district court ruled in their case without regard to constitutional limitations and cite as their authority *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). However, Petitioners failed to acknowledge that in *Societe Internationale* this Court explained that these constitutional limitations are necessary because Rule 37 permits a court "to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.* at 209. In this case, the constitutional limitations upon the power of the district court were clearly delineated in the procedures of Rule 56 and the summary judgment standards established by this Court in *Celotex*, which inherently require an examination of the merits of the non-moving party's cause or provide a means for the non-moving party to delay such an examination.

Moreover, there is no authority supporting the argument that a dismissal of an action pursuant to the well established procedures and standards set forth by Rule 56 can acquire the character of a sanction and thus require the limitations imposed upon a court when dismissing an action pursuant to Rule 37. To the contrary, those circuit courts cited by the Petitioner that have addressed the issue have uniformly held that "summary judgment under Rule 56 is not entered as a sanction." *Anchorage Assoc. v. Virgin Islands Bd. of Tax Review*, 922 F.2d 168, 178 (3d Cir. 1990).[8] Therefore, when "the court

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8. *See also Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3d Cir. 1991) (finding that the imposition of dismissal pursuant to a local rule would not acquire the character of a sanction unless the motion to dismiss was granted solely because it had been unopposed); *Jaroma v. Massey*, 873 F.2d 17, 20-

(Cont'd)

determines that the moving party is entitled to judgment as a matter of law based on the facts presented in the motion, [and the response thereto] . . . neither a hearing nor consideration of [those factors limiting a courts discretion under Rule 37] are required before judgment is entered." *Id.* at 176.

(Cont'd)

21 (1st Cir. 1989) (holding that the imposition of dismissal pursuant to the local rule would not acquire the character of a sanction and, thus, would not "run afoul of the requirements of Fed. R. Civ. P. 56" as long as the court first inquires as to whether the motion supports a finding that there is no genuine issue of material fact on the record); *Dunlap v. Transamerica Occidental Life Ins. Co.*, 858 F.2d 629, 632 (11th Cir. 1988) (dismissal pursuant to local rule will acquire the character of a sanction only if the court fails to review the case on the merits); *In Re Liberty Trust Co. v. Leslie*, 903 F.2d 1053, 1055 (5th Cir. 1990) (entry of summary judgment on the merits will not be deemed to be tantamount to judgment by default); *Geear v. Boulder Community Hosp.*, 844 F.2d 764 (10th Cir. 1988) (local rule permitting dismissal after review on the merits does not conflict with Fed. R. Civ. P. 56).

CONCLUSION

The petition for writ of certiorari should be denied in all respects.

Respectfully submitted,

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Dated: December 31, 1996

APPENDIX A — UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, LOCAL RULE OF CIVIL PROCEDURE 20

RULE 20. MOTION PRACTICE

(a) Every motion shall be accompanied by a form of order which, if approved by the court, would grant the relief sought by the motion. Every response in opposition to a motion shall be accompanied by a form of order, which, if approved by the court, will deny or amend the relief sought by the motion.

(b) Every uncontested motion shall be accompanied by a certificate of counsel that such motion is uncontested.

(c) Every motion not certified as uncontested shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion. Unless the parties have agreed upon a different schedule and such agreement is set forth in the motion, or unless the court directs otherwise, any party opposing the motion shall serve a brief in opposition, together with such answer or other response as may be appropriate, within ten (10) days after service of the motion and supporting brief. (*Note:* pursuant to F.R.Civ.P. 6(e), an additional three (3) days shall be allowed if service is made by mail.) In the absence of timely response, the motion may be treated as uncontested. The court may require or permit further briefing if appropriate.

(d) Every motion not certified as uncontested shall be accompanied by a written statement, as to the date and manner of service of the motion and supporting brief.

(e) Within ten (10) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trial by a

writing delivered to the Court Reporter Coordinator, or (b) file a verified motion showing good cause to be excused from this requirement. Unless a transcript is thus ordered, or the movant excused from obtaining a transcript, the post-trial motion must be dismissed for lack of prosecution.

(f) Any interested party may request oral argument on a motion. The court may require oral argument, whether or not requested by a party. The court may dispose of a motion without oral argument.

(g) Motions for reconsideration or reargument shall be served within ten (10) days after the entry of the judgment, order, or decree concerned.

Effective May 31, 1990.

Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

No. 96-803

In The

Supreme Court of the United States

October Term, 1996

STEVEN D. SITKOFF and BERNICE E. SITKOFF, Individually and as Parents and Natural Guardians of Jessica Sitkoff, a Minor, and as Administrators of the Estate of Gwyn Allison Sitkoff, Deceased,

Petitioners,

v.

BMW OF NORTH AMERICA, INC. and BAVARIAN MOTOR WORKS, A.G., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners Steven D. Sitkoff and Bernice E. Sitkoff hereby reply to the brief of respondents in opposition to the petition for a writ of certiorari.

ARGUMENT IN REPLY

The "crash films, test reports, design drawings, approximately 220 photographic slides, 16 still photograph and video reproductions of vehicular rollover tests, and various documents relative to the 325i . . . ", referred to on page 4 of respondents' brief, concerned a hardtop coupe, not a convertible. (Petition at 3; R. 507-516). The production of this information was irrelevant to the crashworthiness claims and therefore was insufficient for the Sitkoffs' experts to prepare expert reports about safety and design alternatives for a convertible.

CONCLUSION

For the reasons set forth above, and in the petition, petitioners urge that the petition for a writ of certiorari be granted.

Respectfully submitted,

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